No. 01-46

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE SOUTH CAROLINA STATE PORTS AUTHORITY

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QUESTION PRESENTED

The principle that a private party cannot sue a sovereign without its consent has been universally established and accepted since before the founding of our Nation. The States' retention of their sovereign immunity was essential to their ratification of the Constitution, which created our dual system of government. In this case, the United States Court of Appeals for the Fourth Circuit rejected a federal administrative agency's claim that it has the power to adjudicate a private suit against a nonconsenting state.

This case presents the following question:

> Whether a nonconsenting state is entitled to assert its sovereign immunity from a private suit for specific relief and damages filed with a federal administrative tribunal.

LIST OF PARTIES

All parties are identified in the caption, except the United States is a respondent here and was also a respondent before the United States Court of Appeals for the Fourth Circuit.

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BRIEF FOR RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY

OPINIONS BELOW

The respondent South Carolina State Ports Authority ("Ports Authority") agrees with the petitioner's citation of the opinions below with two exceptions. The opinion of the Federal Maritime Commission ("Commission") appears in the Appendix to Petition for Writ of Certiorari ("Pet. App.") at 27a-38a. Also, the opinion of the administrative law judge appears in the Pet. App. at 39a-62a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent parts of sections 2, 10, and 13 of the Shipping Act of 1984, 46 U.S.C.A. app. §§ 1701-1719 (West 1975 & Supp. 2001) (hereinafter "Shipping Act"), appear in the Appendix at 1a-2a, as additions to the provisions cited by the Commission.

STATEMENT

This case involves the State of South Carolina's assertion of its sovereign immunity from a suit filed by a private citizen before the Commission against the Ports Authority, an agency of the State.

South Carolina Maritime Services, Inc. ("Maritime Services"), a corporation organized under the laws of the State of South Carolina, filed a complaint against the Ports Authority with the Commission seeking injunctive relief and reparations for alleged violations of the Shipping Act of 1984. (J.A. at 7). The State asserted, *inter alia*, sovereign immunity as a defense. *Id.* at 18.

The United States Court of Appeals for the Fourth Circuit held that a state is entitled to assert its sovereign immunity in a suit filed by a private party with a federal administrative

agency. *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165 (4th Cir. 2001) (Pet. App. at 1a-25a).

1. *The Federal Maritime Commission.* The Commission is a federal regulatory agency located in Washington, D.C., holding specified regulatory responsibilities over ocean shipping services in United States foreign commerce as set forth in the Shipping Act. The Commission primarily oversees certain agreements exempted from antitrust laws among ocean common carriers or other entities, such as marine terminal operators, engaged in United States foreign commerce. 46 U.S.C.A. app. §§ 1703-1706. The Commission has no jurisdiction over gambling vessel operations, safety, environmental protection, navigation, vessel construction, vessel documentation, vessel inspection, or licensing of seafaring personnel.

The principal shipping statute that is administered by the Commission is the Shipping Act. In pertinent part, the Act authorizes private formal complaints alleging violations of the Act, including the granting of "any undue or unreasonable preference" or "unreasonably refus[ing] to deal." 46 U.S.C.A. app. §§ 1709(d)(4) & (b)(10).

The Shipping Act authorizes two kinds of proceedings to determine a violation of the Act. First, the Shipping Act authorizes the Commission to conduct its own investigations into alleged violations of the Act. *Id.* § 1710(c); *see also* 46 C.F.R. § 501.5(i) (2001) (establishing responsibilities of the Bureau of Enforcement); 46 C.F.R. § 502.281-291 (2001) (discussing nonadjudicatory investigations). Second, section 11(a) of the Shipping Act allows a private citizen to file a complaint with the Commission for alleged violations of the Act, 46 U.S.C.A. app. § 1710(a), and grants the Commission the authority to award reparations to the private citizen. *Id.*

§ 1710(g).[1] As the Fourth Circuit concluded below, the doctrine of sovereign immunity, embodied in the Eleventh Amendment, bars the proceeding when a private party files a complaint against a nonconsenting state. (Pet. App. at 23a).

When a party files a formal complaint with the Commission, the proceeding "takes the form of an adjudication." *Id.* at 15a. The case is assigned to an administrative law judge, who presides over discovery, pre-trial and trial proceedings. 46 C.F.R. pt. 502, subpt. J. The administrative law judge issues a decision that is final and binding unless a party requests review by the Commission or the Commission undertakes review on its own initiative. *Id.* § 502.227.

Unlike private complaint proceedings, when the Commission initiates its own investigation, it selects the target(s) of the investigation, frames the issues, establishes a schedule for the investigation, and authorizes its representatives to conduct the investigation. *Id.* pt. 502, subpt. R. The Commission primarily regulates through this investigatory authority. Since 1990, the Commission has brought an average of 208 formal investigations per year and collected an average of $6 million in civil penalties per year. *See* 1990-2000 FED. MAR. COMM'N ANN. REPS. (Appendix at 3a). Further, the Commission may hold investigational hearings, which are "distinguished from hearings in adjudicatory proceedings," 46 C.F.R § 502.285(a), and may seek an injunction in federal district court, if warranted. 46 U.S.C.A. app. § 1713(c).

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[1] Section 1710(g) provides in part:

> (g) Reparations. For any complaint filed within 3 years after the *cause of action* accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this chapter plus reasonable attorney's fees . . . .

46 U.S.C.A. app. § 1710(g) (emphasis added).

The Ports Authority does not challenge the Commission's authority to use this investigative power to regulate state conduct, recognizing that its sovereign immunity does not apply in an action brought by the federal government. Because Congress provided the Commission with jurisdiction to investigate and bring its own action as it deems appropriate, the Fourth Circuit's decision does not impair the Commission's enforcement of the Shipping Act; nor does it leave state ports immune from regulation, as the United States concedes. (Br. for United States in Opp'n to Pet. for Cert. at 20-21).

2. *The Proceedings Below.* Maritime Services, a South Carolina citizen, chartered a passenger ship known as the M/V TROPIC SEA intending to offer gambling cruises to nowhere and to the Bahamas from the port of Charleston, South Carolina. (J.A. at 7, 9, ¶¶ 1, 8). The gambling would occur in international waters. *Id.* at 9-10, ¶¶ 8-9. The M/V TROPIC SEA was originally classified as a ferry.[2] Although it can board 800 passengers, it has overnight accommodations for only 200 passengers. (J.A. filed in the 4th Cir. at 35).

The Ports Authority has an established policy of denying berthing space to vessels whose primary purpose is gambling. *Id.* at 18. Based on this policy and its finding that the M/V TROPIC SEA is primarily a gambling vessel, the Ports Authority denied Maritime Services a berth at the Charleston harbor. In its complaint before the Commission, Maritime Services alleged that the Ports Authority allowed another cruise vessel to berth in Charleston's port, (J.A. at 12-14, ¶¶ 22-27), and that the Ports Authority's refusal to grant the same privilege to the M/V TROPIC SEA was unreasonable and discriminatory under the Shipping Act, *id.* at 10-12, ¶¶ 10-21.

[2] [Vol. P-Z] LLOYD'S REGISTER OF SHIPPING: REGISTER OF SHIPS 1999-2000 at 1497 (1999). The M/V TROPIC SEA is also known as the M/V TROPICANA, the classification of which appears in this widely used industry ship register.

However, the other cruise vessel was operated by Carnival Cruise Lines and unquestionably had a primary purpose other than gambling. (J.A. filed in the 4th Cir. at 35).

Maritime Services alleged that the Ports Authority's disparate treatment violated the Shipping Act by refusing to deal, 46 U.S.C.A. app. § 1709(b)(10), and by unduly and unreasonably preferring a cruise line and prejudicing Maritime Services, *id.* § 1709(d)(4). (J.A. at 14-15, ¶¶ 28-33). Maritime Services sought a cease and desist order as well as compensation for actual damages, interest, and attorney's fees. *Id.* at 16. Maritime Services also requested that the Commission seek a temporary restraining order and a preliminary injunction from the district court, enjoining the Ports Authority from refusing to provide berthing space to the M/V TROPIC SEA. *Id.*

The Commission assigned the complaint to its chief administrative law judge, and the Ports Authority filed a motion to dismiss the complaint asserting, *inter alia,* sovereign immunity.[3] Because the Ports Authority is indisputably an arm of the State of South Carolina, *see Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1052 (4th Cir. 1995), Chief Administrative Law Judge Kline granted the Ports Authority's motion and dismissed the complaint on January 5, 2000. Judge Kline concluded that the Commission could avoid all sovereign immunity issues by invoking its authority to institute its own investigation into the alleged violations, or the Commission could refer the case to the Commission's Bureau of Enforcement for its recommendation. (Pet. App. at 39a-62a).

Notwithstanding his recommendation, the Commission, *sua sponte,* reviewed and reversed Judge Kline's decision in a

[3] The Ports Authority also challenged the Commission's authority to review the state regulation of gambling vessels under the Johnson Act, 15 U.S.C.A. § 1175 (West 1998 & Supp. 2001), and raised other jurisdictional issues.

closed Commission meeting without briefing or a hearing. *Id.* at 27a-38a. The Ports Authority filed a timely petition for review with the United States Court of Appeals for the Fourth Circuit. The United States and the Commission appeared as respondents before the Fourth Circuit and took different positions on the enforceability of Commission orders against a nonconsenting state. The United States argued below that the complainant could file and prosecute a suit with the Commission against a nonconsenting state, but conceded that any reparations order issued by the Commission would not be enforceable in a federal district court. The Commission disagreed with the United States, arguing instead that its orders are fully enforceable against a state.

In a unanimous opinion written by Chief Judge Wilkinson, the Fourth Circuit reversed the Commission's judgment and remanded the case with instructions to dismiss. *Id.* at 25a. Relying upon Supreme Court precedent which holds that a state's sovereign immunity "transcends the forum in which the state is sued," the Fourth Circuit held that a state is entitled to assert its sovereign immunity in private complaints filed with federal administrative agencies. *Id.* at 6a. The Fourth Circuit's holding is also consistent with the Tenth Circuit's holding that both the United States and a state are entitled to assert sovereign immunity in a federal administrative agency's adjudication of a private complaint. *Hensel v. Office of the Chief Admin. Hearing Officer*, 38 F.3d 505, 508-10 (10th Cir. 1994).

SUMMARY OF ARGUMENT

The Ports Authority is an arm of the State, and therefore, is not subject to private suits without its consent as guaranteed by the doctrine of sovereign immunity embodied in the United States Constitution. The immunity is not lost merely because the suit is filed with an Article I tribunal, as opposed to an Article III court.

In *Alden v. Maine*, 527 U.S. 706 (1999), this Court held that the States' sovereign immunity applies in their own state court proceedings. *Alden* followed Supreme Court precedent, dating back to *Hans v. Louisiana*, 134 U.S. 1 (1890), which consistently holds that the States' sovereign immunity is not limited by the terms of the Eleventh Amendment. In *Alden*, this Court rejected the argument that the States are immune only in courts exercising the "judicial power of the United States" as the phrase is used in the Eleventh Amendment. To the contrary, the Court held that the States' constitutional guarantee of sovereign immunity applies "regardless of the forum." *Alden*, 527 U.S. at 749.

Thus, *Alden* commands the answer to the question presented in this case. The States retain their right to immunity from private complaints filed in federal district courts, federal administrative proceedings, and their own state courts. *Alden's* application to federal administrative proceedings is reinforced by the adversarial nature of the agency's adjudication of private complaints. As the Fourth Circuit found, private complaint proceedings before the Commission are properly classified as adjudications. "An impartial officer presides in an adversarial proceeding to determine the rights and responsibilities of different parties." (Pet. App. at 15a-16a). "The proceeding thus walks, talks, and squawks very much like a lawsuit." *Id.* at 15a.

Sovereign immunity would have little substance if Congress could abrogate that immunity by changing the forum for the adjudication of private complaints against a nonconsenting state. In *Seminole Tribe v. Florida*, 517 U.S. 44, 73 (1996), this Court held that Congress could not abrogate the States' immunity pursuant to its Article I powers by enacting legislation that subjects the States to suits filed by private parties. Thus, the rationale of *Seminole Tribe* requires the application of the doctrine of sovereign immunity to federal administrative proceedings. To hold otherwise would grant Congress the power to avoid this Court's proscription

that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.*

In *Hans*, this Court assumed that the identical principle of sovereign immunity applies to both the States and the United States. This flows inexorably from the structure of the Constitution itself, because the immunity is inherent in the sovereignty that the United States obtained from and shares with the States. All three branches of the government of the United States recognize that the principle of sovereign immunity—as it is asserted by the United States—applies to federal administrative proceedings as well as judicial proceedings.

In *West v. Gibson*, 527 U.S. 212 (1999), all members of this Court acknowledged that the federal government's sovereign immunity applies in federal administrative proceedings. Because this Court has consistently recognized that our constitutional system of government is based in part upon the dual sovereignty of the United States and the States, the States are certainly "entitled to a reciprocal privilege" in this case. *Alden*, 527 U.S. at 749-50. Neither the Commission nor the United States offers, much less explains the basis for, any distinction between the principle of sovereign immunity as applied to the States and the United States.

The Shipping Act does not abrogate the States' sovereign immunity, South Carolina has not waived its immunity from this suit, and no other exception to the doctrine of sovereign immunity applies. Thus, the Fourth Circuit properly concluded that the Commission does not have jurisdiction over the Ports Authority in this private suit seeking monetary and injunctive relief.

ARGUMENT

I. THE DOCTRINE OF SOVEREIGN IMMUNITY BARS THE COMMISSION FROM ADJUDICATING A SUIT FILED BY A PRIVATE PARTY AGAINST A NONCONSENTING STATE.

The doctrine of sovereign immunity embodies the bedrock principle that a sovereign may not be sued by a private citizen absent its consent. The doctrine and its widespread acceptance predate the Constitution and the founding of our Nation. Indeed, sovereign immunity is one of the first principles woven in the fabric that forms the backdrop of our dual system of government, and immunity is inherent in the concept of sovereignty itself. A respect for the sovereignty of both the States and the United States has remained critical to a functional coexistence between the federal government and the governments of the States.

A. *Alden* and *Seminole Tribe* compel the conclusion that the States' sovereign immunity applies in private suits before federal administrative tribunals.

This Court's recent decisions in *Alden* and *Seminole Tribe* compel only one answer to the question presented in this case. These decisions teach, respectively, that a state's constitutional right to immunity from private suits without its consent applies regardless of the forum in which the suit is brought and that Congress cannot use its Article I powers to curtail a state's sovereign immunity rights. No further authority is needed to conclude that private suits before federal administrative tribunals implicate the States' sovereign immunity.

1. *The States retain their constitutional right to assert their sovereign immunity from private suits, regardless of the forum in which the action is brought.*

In *Alden*, this Court established that the doctrine of sovereign immunity does not depend on the forum, but rather on the identity of the defendant and the plaintiff. *See Alden*, 527 U.S. at 749 (holding that private suits against non-consenting States subjects the States to the indignity of the coercive process "regardless of the forum"); *see also id.* at 733 (sovereign immunity "does not turn on the forum in which the suits [are] prosecuted"). If the defendant is a state or a state agency, it enjoys immunity from suit filed by a plaintiff that is a private party, unless the state has consented to the suit. Indeed, *Alden* stands for the proposition that "the sovereign immunity of the states transcends the forum in which the state is sued." (Pet. App. at 6a). The Fourth Circuit, therefore, properly found that "a state's sovereign immunity is not so fleeting as to depend upon the forum in which the state is sued." *Id.* at 2a.

The Fourth Circuit properly applied this Court's holding in *Alden* to the question presented in this case:

> The states' concerns with affronts to their dignity and to the possibility of having to answer for their war debts would not disappear because the forum magically changed from an Article III court to an Article I tribunal. And while the coordinate branches of the federal government have the broadest latitude in organizing themselves as they see fit, they cannot employ an administrative structure that allows an end-run around the Constitution. Sovereign immunity is not so hollow a concept as to prohibit proceedings in certain fora like a federal or state court while at the same time permitting a similar proceeding to take place under the auspices of a legislative court or an agency adjudication. Dual sovereignty posits a relationship of mutual respect between Congress and the states. It is not consistent with that relationship for Congress to subject an unconsenting sovereign to the coercive club of private actions regardless of the forum.

Id. at 13a (citing *Alden*, 527 U.S. at 733).

The State is not asking this Court to reach a novel holding here, nor was *Alden* a departure from existing jurisprudence. Instead, this Court recognized over 100 years ago the principle that "neither a State nor the United States can be sued as a defendant *in any court in this country* without [its] consent." *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883) (emphasis added). This Court also has observed that "[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission . . . ." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (emphasis added), *quoted in Hans*, 134 U.S. at 17, and *Seminole Tribe*, 517 U.S. at 69.

The sound public policy underlying the doctrine of sovereign immunity supports its application regardless of the forum.

> [B]ut for the protection which [sovereign immunity] affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.

Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1868). A private suit against a state, whether adjudicated by a federal court, a federal tribunal, or a state court, still violates the same basic policy that supports the States' immunity. The instant suit seeks the same relief a private party would seek in any traditional court; namely, Maritime Services seeks to compel the payment of money from the State and seeks an order from the federal government compelling the State to

act, which violates textbook principles of sovereign immunity regardless of where the private party files the suit. The State still must "defend or default" and "must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor." *Alden*, 527 U.S. at 749. As the Fourth Circuit recognized:

> Whether the proceeding is formally called an administrative action, a lawsuit, or an adjudication does not matter. The fundamental fact, which respondents cannot escape, is that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state.

(Pet. App. at 14a).

Therefore, it is clear that a private party cannot bring an adversarial proceeding against a nonconsenting state in any forum, whether that forum be a federal court, the state's own courts, or a federal administrative tribunal.

2. *Congress cannot use its Article I powers to circumvent the constitutional limitations on the States' amenability to suit.*

The question before this Court is also answered by the Court's statement in *Seminole Tribe* that "Article I cannot be used to circumvent the constitutional limitations placed upon *federal jurisdiction.*" *Seminole Tribe,* 517 U.S. at 73 (emphasis added); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000) (holding that "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals."). "Federal jurisdiction" includes federal administrative agencies sitting in an adjudicative capacity.

The Commission's adjudication of the private plaintiff's claim in this case would not differ in its effect upon the State from an Article III tribunal's adjudication of the same claim. The Article I tribunal serves the same purpose as an Article

III court. In either case, a nonconsenting State is haled into court by a private citizen who seeks injunctive relief and monetary damages from the State. As the Fourth Circuit aptly noted, "it is equally well established that sovereign immunity bars not just lawsuits filed in courts of law, but rather all proceedings against a non-consenting sovereign." (Pet. App. at 8a). Moreover, this Court's "cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States." [4] *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 889 (1991).

The States entered the Union with their immunity over 200 years ago, and the right of immunity remains intact today regardless of the creation by Congress of new Article I courts not contemplated by the drafters or the States when the Constitution was adopted. Indeed, a remarkable irony would result if Congress did not have the authority to abrogate the States' immunity through legislation enacted pursuant to Article I (and indubitably it does not), but Congress could legislatively create Article I courts to adjudicate private suits against the States involving Article I concerns and the States' immunity would not apply. To deny the States their sovereign immunity in federal administrative proceedings would permit the anomalous result of allowing Congress to enact legislation creating Article I courts and vest those courts with broad jurisdiction over private suits filed against the States.

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[4] Judicial power is regularly exercised outside the walls of Article III courts. Non-Article III courts enforce federal civil and criminal laws. It would be shocking to find that cases tried in military tribunals, for example, involving severe criminal sanctions, do not involve the judicial power of the United States. Further, territorial courts, which are not Article III courts, decide cases governed by admiralty and maritime law, even though the Constitution expressly states that "all Cases of admiralty and maritime Jurisdiction" fall within the "judicial power" of the United States. *Palmore v. United States*, 411 U.S. 389, 403 (1973) (citing *Am. Ins. Co. v. Canter,* 26 U.S. (1 Pet.) 511 (1828)).

Even more troublesome is the potential that Article I courts could adjudicate the very private party suits this Court has decried as running afoul of the States' sovereign immunity, compromising the well settled principle that Congress cannot sidestep constitutional limitations. *See United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995); *Harris v. McRae*, 448 U.S. 297, 331 (1980). These federal administrative tribunals would enjoy far greater power over the States than that held by Article III courts. Allowing this result would be diametrically opposed to this Court's holding in *Seminole Tribe* that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 73.

The administrative law judge in this case aptly recognized this irony and concluded:

> If federal courts that are established under Article III of the Constitution must respect States' 11th Amendment immunity and Congress is powerless to override the States' immunity under Article I of the Constitution, it is irrational to argue that an agency like the Commission, created under an Article I statute, is free to disregard the 11th Amendment or its related doctrine of State immunity from *private* suits.

(Pet. App. at 59a).

Because the States' sovereign immunity applies "regardless of the forum," *Alden*, 527 U.S. at 749, and because Congress may not use its Article I powers to strip the States of their immunity, *Seminole Tribe*, 517 U.S. at 73, the only possible conclusion is that the States are entitled to assert their immunity in federal administrative proceedings when sued by a private citizen. Any other result would raise up "anomalous and unheard-of proceedings," *Hans*, 134 U.S. at 18, to which the States did not agree when ratifying the Constitution and allocating federal powers. It would also provide a beltway around the Constitution and this Court's precedent recognizing the constitutional limitation on Congress'

authority to abrogate the States' immunity. Denying the States their immunity in federal administrative proceedings would allow Congress to create a forum for private party disputes heretofore barred against the States in Article III courts and state courts.

If the holding of *Seminole Tribe* that Congress may not abrogate the States' immunity under Article I is to have any meaning and effect, the case must equally prohibit the creation by Congress of Article I courts with jurisdiction over nonconsenting states. Because Congress has "wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals," *Freytag*, 501 U.S. at 910, it would be anomalous, and contrary to *Alden*, to limit sovereign immunity to Article III court proceedings. *See Alden*, 527 U.S. at 730 (concluding that the States' sovereign immunity "is not directly related to the scope of the judicial power established by Article III"). The Fourth Circuit recognized this irony below and properly refused to allow the inconsistent result. As the court observed, "[i]f Article I courts can indeed exercise the judicial power, it would seem anomalous to limit state sovereign immunity strictly to an Article III proceeding." (Pet. App. at 11a).

B. History, practice, precedent and the structure of the Constitution demonstrate that the doctrine of sovereign immunity, embodied in the Eleventh Amendment, applies to federal administrative proceedings.

Long gone are the days in which one could legitimately argue that a state's immunity from suit without its consent was limited by the precise verbiage of the Eleventh Amendment. This Court has recognized that while the States' sovereign immunity is often referred to as "Eleventh Amendment immunity," the phrase is "something of a misnomer, for the sovereign immunity of the States neither

derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713.

A review of "history, practice, precedent, and the structure of the Constitution" all support the Fourth Circuit's finding that the doctrine of sovereign immunity bars proceedings before the Commission when the Commission adjudicates claims asserted by a private party against a nonconsenting state. *Id.* at 741; *see also Printz v. United States*, 521 U.S. 898, 918 (1997).

1. *History*

As the Fourth Circuit found below, "[t]he doctrine of sovereign immunity predates the founding of our nation." (Pet. App. 3a). The understanding "'that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified,'" *id.* (quoting *Alden*, 527 U.S. at 715-16), and the States entered the Union with this immunity intact, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

In its opinions confirming the protections afforded the States by the doctrine of sovereign immunity, the Court relies extensively on the following oft-quoted statement written by Alexander Hamilton (which bears repeating here):

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. . . .

THE FEDERALIST No. 81, at 506 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As the Court has recognized, Hamilton was not alone in his views. James Madison also stated: "It is not in the power of individuals to call any state

into court." 3 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1836), *quoted in Seminole Tribe*, 517 U.S. at 70 n.12. Echoing Madison, future Chief Justice Marshall recognized: "It is not rational to suppose that the sovereign power should be dragged before a court." *Id.* at 555, *quoted in Hans*, 134 U.S. at 13.[5]

Despite the widespread understanding regarding the States' sovereign immunity at the adoption of the Constitution, in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Supreme Court held that Article III authorized a private citizen of South Carolina to sue the State of Georgia without its consent. *Id.* at 450-51 (opinion of Blair, J.), 465 (opinion of Wilson, J.), 466-67 (opinion of Cushing, J.), 476-77 (opinion of Jay, C.J.). The outrage following the Court's decision provoked the almost immediate ratification of the Eleventh Amendment. *See, e.g.*, CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926) (noting that *Chisholm* "fell upon the country with a profound shock"), *quoted in Alden*, 527 U.S. at 720. History teaches "that Congress acted not to change but to restore the original constitutional design" in enacting the Eleventh Amendment. *Alden*, 527 U.S. at 722. Thus, the Eleventh Amendment reflects "a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away."

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[5] "[T]his Court has consistently taken the views of Madison, Marshall, and Hamilton as capturing the true intent of the Framers." *Nevada v. Hall*, 440 U.S. 410, 436 (1979) (Rehnquist, J., dissenting) (citing *Edelman v. Jordan*, 415 U.S. 651, 660-62 (1974); *Monaco v. Mississippi*, 292 U.S. 313, 323-30 (1934); *Hans*, 134 U.S. at 12-15). The Framers' views provide a powerful voice, and this Court has "usually regarded [their views] as indicative of the original understanding of the Constitution." *Printz*, 521 U.S. at 910.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 32 (1989) (Scalia, J., dissenting), *overruled by Seminole Tribe*, 517 U.S. at 63-73.

History is telling. The Framers and proponents of the Constitution promised the States in no uncertain terms that they would continue to be immune from suits at the hands of private citizens. Without this promise, it is clear the States would never have ratified the Constitution, thereby creating the federal government vested with "few and defined powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991).

The Framers' understanding of the doctrine of sovereign immunity, as applied to both the States and the United States, focused upon the suability of a sovereign, and not upon the forum in which the suit was brought. The constitutional debates certainly addressed Article III, but only because of the concern that Article III might subject nonconsenting states to private suits. The basis for rejecting the idea that Article III granted such a power derived from the general understanding that the "suability of a state" by a private party "was a thing unknown to the law," *Hans*, 134 U.S. at 15-16, and the States' immunity would be preserved inviolate under the constitutional design, *Printz*, 521 U.S. at 918-19. Obviously, the debates did not address the suability of a state by private parties before a federal administrative tribunal because such a forum generally was not available or contemplated at that time.

2. *Practice*

Looking back to early congressional practice, statutes did not exist that authorized private suits before federal administrative agencies against nonconsenting States. *See Alden*, 527 U.S. at 744 (concluding that "statutes purporting to authorize [private suits] in any forum are all but absent from our historical experience" until this Court faced the issue in the 1964 case of *Parden v. Terminal Railway of the*

Alabama State Docks Department, 377 U.S. 184 (1964)).[6] While similar statutes may have been enacted in the last generation, "'they are of such recent vintage that they are no more probative than the [statute under review] of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice.'" *Alden*, 527 U.S. at 744 (quoting *Printz*, 521 U.S. at 918). Early congressional practice suggests that Congress understood from the beginning that the States' sovereign immunity would apply in any forum; and thus, Congress did not attempt to subject the States to private suits before federal administrative tribunals or any other fora.

Against the backdrop of history that demonstrates the importance of the States' sovereign immunity to the founding generation, this Court has "recognized a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the constitution was adopted.'" *Id.* at 727 (quoting *Hans*, 134 U.S. at 18). This Court has "often described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Id.* at 745. Thus, this Court has upheld the States' immunity in various contexts falling outside the literal text of the Eleventh Amendment.

Because private suits filed with federal administrative agencies against nonconsenting states were "anomalous" and "unheard-of proceedings" at the time of the Constitution's adoption, this Court should presume that the States' immunity is preserved and that it protects the States from such proceedings.

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[6] This Court overruled *Parden* in *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

3. *Precedent*

This Court has consistently recognized that the Constitution reflects a system of "dual sovereignty." *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (stating that "under our federal system, the States possess sovereignty concurrent with that of the federal government, subject only to the limitations imposed by the Supremacy Clause"). Thus, it is no surprise that since *Chisholm* was rejected by the Eleventh Amendment, this Court has adhered steadfastly to the principle of sovereign immunity as protecting both the States and the United States from suits by private parties without their consent.

As early as 1821, Chief Justice Marshall recognized the application of sovereign immunity to the United States in dicta in both *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-42 (1821), and *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834). Justice Davis, writing for a unanimous Court in *Nichols*, focused on the importance of the operation of sovereign immunity to the sovereign's performance of its duties. *Nichols*, 74 U.S. (7 Wall.) at 126.

In *Hans*, the Court held that the Eleventh Amendment bars a citizen from suing his own State even though the literal text of the Amendment only appears to prohibit suits filed against states by citizens of another state or of a foreign state. *Hans*, 134 U.S. at 1. After reviewing the history of the Eleventh Amendment, the Court noted the "'established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent.'" *Id.* at 17 (quoting *Beers*, 61 U.S. (20 How.) at 529). The Court reiterated its own holding in *Cunningham* that the sovereign immunity enjoyed by the States is concurrent with that of the United States:

> "It may be accepted as a point of departure unquestioned," said Mr. Justice MILLER . . . , "that *neither a state nor the United States* can be sued as

> defendant in any court in this country without their consent . . . ."

Id. (quoting *Cunningham*, 109 U.S. at 451) (emphasis added). The Court concluded that adhering to the "letter" of the Amendment would not serve the doctrine of sovereign immunity embodied in the Eleventh Amendment. *Id.* at 15.

In *Seminole Tribe*, the Court rejected the plurality opinion of *Union Gas* that the Interstate Commerce Clause in Article I granted Congress the authority to abrogate the States' immunity from suit, and the Court expressly held that Article I *does not* authorize Congress to abrogate the States' sovereign immunity. *See Seminole Tribe*, 517 U.S. at 63-73. In so holding, the Court reconfirmed that

> [T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States . . . . *Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.*

Id. at 72-73 (emphasis added). Even though the statute at issue only authorized prospective injunctive relief, the Court held that "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity."[7] *Id.*

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[7] The Fourth Circuit below correctly concluded that even if Maritime Services only sought injunctive relief against the Ports Authority in this case, the doctrine of sovereign immunity would still bar the suit. (Pet. App. at 6a). As the Court recognized in *Seminole Tribe*, "we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. . . . We think it follows *a fortiori* from this proposition that the type of relief

at 58. A state's sovereign immunity protects it not only from judgments paid out of its treasury, but also from the indignity of being haled into court by a private party and having to defend itself. *Id.*

Most recently, in *Alden*, this Court held that Article I does not grant Congress the authority to subject nonconsenting States to private suits in their own courts. *Alden*, 527 U.S. at 712. This Court reasoned: "Private suits against nonconsenting States, however, present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' *regardless of the forum*." *Id.* at 749 (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887)) (emphasis added); *see also id.* at 733 (holding that sovereign immunity "does not turn on the forum in which the suits [are] prosecuted"). In analyzing the scope of the States' immunity, this Court expressly recognized that the United States enjoys sovereign immunity and that the States are "entitled to a reciprocal privilege." *Id.* at 749-50.

Thus, when this Court embarks to define the scope of the States' sovereign immunity, it honors the promise made to the States over 200 years ago and paints with a broad brush. *See id.* at 745 (describing the States' sovereign immunity in "sweeping terms"); *Nevada v. Hall*, 440 U.S. 410, 438 (1979) (noting that "[w]hen the State's constitutional right to sovereign immunity has been described, it has been in expansive terms.") (Rehnquist, J., dissenting). This Court's precedent establishes a tremendous respect for the sovereignty of both the United States and the States and makes no distinction between the two sovereigns in defining the scope and application of their sovereignty.

4. *Constitutional Structure*

The Court recognizes that the States retain their immunity from suits brought by private citizens unless "compelling

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sought is irrelevant to whether Congress has the power to abrogate States' immunity." *Seminole Tribe.*, 517 U.S. at 58.

evidence" exists to demonstrate that the States surrendered their immunity under the Constitution and the plan of the Convention. *Alden*, 527 U.S. at 730-31 (citing *Blatchford*, 501 U.S. at 781). In essence, the question before the Court is whether the States delegated to the federal government, as one of the "few and defined" powers, the power to abrogate the States' sovereign immunity in federal administrative proceedings. Stated differently by the Fourth Circuit, the question is "would the founders have countenanced a system by which Congress could have avoided all strictures of sovereign immunity by creating different tribunals where state sovereign immunity was completely inapplicable?" (Pet. App. at 12a-13a). To ask the question is to answer it.

As the Fourth Circuit found below:

> The lesson from "the Constitution's structure, its history, and the authoritative interpretations" by the Supreme Court is unmistakable—an adversarial proceeding against a non-consenting state by a private party triggers sovereign immunity.

Id. at 12a (quoting *Alden*, 527 U.S. at 713).

In determining whether a State enjoys the protections afforded by its sovereign immunity, this Court's decisions make clear that the literal text of the Amendment neither begins nor ends the inquiry into the scope of the States' immunity. The Court has repeatedly warned that blind adherence to the literal text does not honor the principle of sovereign immunity and "'"strain[s] the Constitution and the law to a construction never imagined or dreamed of"'" by the drafters. *Seminole Tribe*, 517 U.S. at 69 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934) (quoting *Hans*, 134 U.S. at 16)). Thus, the Court has "'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" *Id.* at 54 (quoting *Blatchford*, 501 U.S. at 779). "This is because the principle of sovereign immunity derives not just from the Eleventh

Amendment, but from the structure and background principles of the Constitution." (Pet. App. at 4a).

> That presupposition, first observed over a century ago in *Hans v. Louisiana* . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,'" . . . . For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

Seminole Tribe, 517 U.S. at 54 (citations omitted).

Therefore, the Fourth Circuit correctly held that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states would not have passed muster at the time of the Constitution's passage nor after the ratification of the Eleventh Amendment." (Pet. App. at 13a).

II. THE STATES ARE ENTITLED TO ASSERT THEIR SOVEREIGN IMMUNITY ON THE SAME TERMS AS THE UNITED STATES.

Based on the same precedent holding that the States are immune from private suits, this Court also subscribes to the "universally received opinion . . . that no suit can be commenced or prosecuted against the United States." *Cohens*, 19 U.S. (6 Wheat.) at 411-12. The United States obtained its sovereign authority, and its very name, by assignment from the States, and whatever attributes of sovereignty are inherent in one must necessarily be inherent in the other. *See Gregory*, 501 U.S. at 457 (recognizing that the States adopted the Constitution that "created a Federal Government of limited powers" and retained the States' "numerous and infinite" powers).

Thus, to the extent that the United States enjoys the benefits of sovereign immunity, it is only because it acquired that attribute of sovereignty from the States. The structure of our

constitutional system embodies and guarantees the United States its immunity from suit, even though the Constitution is silent on the United States' right to immunity.

The United States took no exception to the Tenth Circuit's holding in *Hensel* that both the United States and a state retained their immunity from a private suit before a federal administrative tribunal. The administrative law judge in *Hensel* enjoyed no greater authority than the Commission's administrative law judge in the present case. *Compare* 28 C.F.R. § 68.28 (2001), *with* 46 C.F.R. § 502.147. Without addressing the scope of its own immunity in federal administrative proceedings, the United States now challenges the immunity of the States. Accordingly, this case calls upon the Court to address whether, after nearly 200 years of consistent jurisprudence to the contrary, it should draw a distinction between the scope of the sovereign immunity of the States and the United States. Neither the Commission nor the United States offers any foundation for such a distinction.

A. The sovereign immunity enjoyed by the federal and state governments are concurrent.

Both the United States and the States derive their immunity from the same source—the general understanding of the founding generation when the States adopted the Constitution and formed the United States of America that a sovereign shall not be compelled to answer private suits against its will. The Founders adopted this understanding from the English belief that the king was immune from suit. 1 WILLIAM BLACKSTONE, COMMENTARIES *241-*244.

This Court consistently describes the constitutional system of the United States as one of dual sovereignty because the States' sovereignty is "concurrent with that of the Federal Government." *Tafflin*, 493 U.S. at 458. The Court often intermingles the case law addressing the sovereign immunity of one when analyzing the immunity of the other. *See Hans*,

134 U.S. at 16 (addressing the scope of the States' sovereign immunity, the Court relied upon opinions on the suability of the federal government); *United States v. Lee*, 106 U.S. 196, 206-07 (1882) (in analyzing whether the United States enjoyed immunity, the Court relied upon Justice Iredell's dissent in *Chisholm*, which involved a state's claim of sovereign immunity); *The Siren*, 74 U.S. (7 Wall.) 152, 156 (1868) (relying upon a Pennsylvania state court case defining the scope of Pennsylvania's immunity to support the federal government's immunity in a similar context).

Thus, the principle of sovereign immunity and its application are a general protection afforded to the federal government and the States on the same terms. "It is obvious in our system of jurisprudence, the principle [of sovereign immunity] is as applicable to each of the states as it is to the United States." *Lee*, 106 U.S. at 206. Accordingly, "[i]t may be accepted as a point of departure unquestioned, that *neither a State nor the United States* can be sued as defendant in any court in this country without their consent . . . ." *Cunningham*, 109 U.S. at 450-51 (emphasis added). This is true because "*[e]very government* has an inherent right to protect itself from suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, [and] *applies to every sovereign power* . . . ." *Nichols*, 74 U.S. (7 Wall.) at 126 (emphasis added). Furthermore, "[i]t is a familiar principle that *all governments* possess an immunity from suit, and it is only in a spirit of liberality, and to promote the ends of justice, that they ever allow themselves to be brought into court." *United States v. O'Keefe*, 78 U.S. (11 Wall.) 178, 182 (1870) (emphasis added).[8]

[8] Thus, Congress may waive the federal government's sovereign immunity and permit the United States to be sued by a private party, but Congress may not waive the States' independent sovereign immunity and permit private parties to sue the States.

Most recently, this Court expressly stated in *Alden* that the States are entitled to assert their sovereign immunity on the same terms as the United States. In deciding whether the States enjoy immunity from suits in their own courts, this Court found it significant that the federal government enjoys immunity in its own courts. "In light of our constitutional system recognizing the essential sovereignty of the States," this Court recognized that the States are "entitled to a reciprocal privilege." *Alden*, 527 U.S. at 749-50. Thus, the Court granted the States sovereign immunity on the same terms as the United States enjoys its immunity.

B. The Court's precedent establishes that the federal government's sovereign immunity applies to private suits before federal administrative tribunals.

In *West*, this Court addressed whether the Equal Employment Opportunity Commission ("EEOC"), a federal administrative tribunal, has the authority to award compensatory damages against the federal government in Title VII suits. *West*, 527 U.S. at 214 (5-4 decision). The Justices in the majority found that Congress waived the Government's sovereign immunity through the statute, thereby granting the EEOC the authority to award compensatory damages against the federal government in favor of private citizens. *Id.* at 222. The dissenting Justices disagreed, finding that Congress did not express in clear and unequivocal terms its intent to waive the government's immunity from damages awards. *Id.* at 224-28 (Kennedy, J., dissenting).

Despite the Court's split on the waiver issue, the Court unanimously agreed that the federal administrative agency's adjudication of the private complaint implicated the federal government's sovereign immunity. If immunity did not apply in the proceedings, no discussion or finding of waiver would have been necessary. The majority's analysis establishes that without a waiver under the statute, the Government's immunity would bar the proceedings.

Significantly, *West* unanimously confirms the rule that the United States' immunity applies in proceedings before federal administrative tribunals. *See Seminole Tribe*, 517 U.S. at 67 ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). It must follow that the States are "entitled to a reciprocal privilege." *Alden*, 527 U.S. at 749-50.

C. The United States has asserted its sovereign immunity in federal administrative proceedings.

The United States has also advocated the view that its immunity applies in federal administrative proceedings. A published opinion from the Office of Legal Counsel ("OLC") confirms that the sovereign immunity of the United States is implicated in federal administrative proceedings initiated by a private party. *See* Memorandum from John C. Harrington, Deputy Assistant Attorney General, Office of Legal Counsel, to the General Counsel, Department of the Navy, dated August 17, 1992 ("Re: Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices"), (hereinafter "OLC Memorandum") (Appendix at 4a-21a). A private citizen alleged that the Navy violated the Antidiscrimination Provision of the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1) (West 1999) (hereinafter "IRCA"), which allows the private party to seek injunctive relief, back pay, and civil penalties. *Id.* §§ 1324b(d)(2) & 1324b(g)(2)(B)(iii)-(iv).

The OLC concluded that "[e]nforcement of the Antidiscrimination Provision against the federal government plainly would implicate the sovereign immunity of the United States." OLC Memorandum (Appendix at 8a). The OLC reasoned that sovereign immunity must bar a private party from bringing an action against the United States before the federal administrative agency because an award of back pay

against the United States would "expend itself on the Treasury" and an order requiring the hiring of certain individuals would "restrain the United States Government from acting or compel it to act." *Id.* at 8a-9a (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Land v. Dollar*, 330 U.S. 731, 738 (1947)). The OLC also noted that IRCA provides for judicial enforcement of administrative orders in district courts, *id.* at 9a, and thus, "disputes under IRCA . . . are not resolved entirely within the executive branch." *Id.* at 8a n.3. Significantly, the OLC found that "[t]he fact that application of the Antidiscrimination Provision to federal agencies would render one aspect of the enforcement scheme ineffectual provides independent reason to question the application of the provision to these agencies." [9] *Id.* at 9a n.4.

The United States has also asserted its sovereign immunity in the same context as the State asserts its immunity in this case. In *Hensel*, both the State of Oklahoma and the United States asserted their sovereign immunity in a suit filed by a private party before a federal administrative tribunal. Alleging that the defendants violated IRCA, the plaintiff filed a discrimination claim against a state health center and a federal teaching hospital with the Administrative Law Judge of the United States Department of Justice Executive Office for Immigration Review ("ALJ"). *Hensel*, 38 F.3d at 506-07.

On appeal, the United States argued: "Sovereign immunity bars an action if, among other things, '"the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration" . . . or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."'" Brief of the United States Department of Justice in *Hensel* on behalf of Respondent Oklahoma City Veterans Affairs Medical Center at 19-20

[9] *See* discussion *infra* Part III.B.2, stating that the unenforceability of the Commission's orders further indicates that the States' immunity applies to the Commission's private complaint proceedings.

(quoting *Dugan*, 372 U.S. at 620 (quoting *Land*, 330 U.S. at 738, and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949), respectively)) (Appendix 23a). Consistent with the position of the States in both *Hensel* and the present case, the United States argued that allowing the federal administrative agency to adjudicate a private suit against the United States "*plainly would implicate sovereign immunity*. . . . Therefore, sovereign immunity bars this action unless it has been waived." *Id.* (emphasis added).

The Tenth Circuit followed this Court's instruction that """the terms of [the United States'] consent to be sued *in any court* define that court's jurisdiction to entertain the suit."'" *Hensel*, 38 F.3d at 507 (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941))) (alteration in original, emphasis added). The Tenth Circuit, therefore, agreed with the United States that its immunity applied and that the United States had not waived its immunity. *Id.* at 509-10. As to the state defendant, the court held that the state health center is an arm of the state and likewise is entitled to the protections of the Eleventh Amendment in a federal administrative agency suit filed by a private party. *Id.* at 508. Accordingly, the Tenth Circuit held that the ALJ lacked jurisdiction over both the United States and the State of Oklahoma to adjudicate the private party complaint. *Id.* at 510.

Thus, all three branches of the federal government agree that the United States enjoys immunity from suit in federal administrative proceedings. *See West*, 527 U.S. at 212; *Hensel*, 38 F.3d at 509-10; OLC Memorandum (Appendix at 8a-9a); S. Rep. No. 92-415, at 16 (1971), *cited in* OLC Memorandum (Appendix at 11a) (explaining that it was necessary to bring federal agencies within the ambit of Title VII because otherwise a claimant would have to overcome a "U.S. Government defense of sovereign immunity").

The foregoing authorities establish that the doctrine of sovereign immunity, if asserted by one sovereign in our dual system of government, may also be asserted by the other. Accordingly, if this Court determines that the States may not assert their sovereign immunity in federal administrative proceedings, the United States will also lose the protection of its immunity in the same proceedings. The more principled rule, which follows *West* and honors the constitutional doctrine of sovereign immunity, would afford the States the same protection granted to the federal government in private suits before federal administrative agencies.

III. THE COMMISSION'S ARGUMENTS FAIL TO SUPPORT STRIPPING THE STATES OF THEIR SOVEREIGN IMMUNITY IN PRIVATE SUITS BEFORE FEDERAL ADMINISTRATIVE AGENCIES.

The Commission fails to establish "compelling evidence" that the States surrendered their sovereign immunity in private suits before federal administrative tribunals. The Commission mistakenly attempts to shift the burden to the State by arguing that "a sovereign immunity defense must be supported by evidence in either constitutional history or constitutional design" and that no evidence exists to support immunity in this case. (Br. for Comm'n at 9). However, the Commission, not the State, must provide "compelling evidence" that the Framers and the States believed the States surrendered their immunity from private suits before federal administrative tribunals. *See Alden*, 527 U.S. at 730-31 (citing *Blatchford*, 501 U.S. at 781). The Commission's attempt to shift the burden magnifies its inability to demonstrate that the States intended to subject themselves to suits of this kind when they ratified the Constitution.

The Commission's arguments for denying the States their constitutional and fundamental right to sovereign immunity in federal administrative proceedings all fail to establish the

"compelling evidence" necessary to hold the States' sovereign immunity is removed when a private party hauls a state through the doors of a federal administrative tribunal.

A. When adjudicating a private complaint, federal administrative agencies exercise the judicial power of the United States.

The Commission mischaracterizes this case as an Eleventh Amendment case and argues that the States' sovereign immunity, guaranteed through that Amendment, only applies to courts exercising "the judicial power established in Article III." (Br. for Comm'n at 20). This argument fails under *Alden*, in which the Court rejected the same argument and held that the States' sovereign immunity defense applies to private suits "regardless of the forum." *Alden*, 527 U.S. at 749. The lesson from *Alden* is that the relationship of the parties—not the forum—determines the application of a state's sovereign immunity.

The Commission's narrow reading of sovereign immunity asserts a rephrased version of the argument attempting to limit the States' sovereign immunity through a literal reading of the Eleventh Amendment. This argument has been so often rejected by the Court it hardly bears refuting. In this case, a South Carolina citizen sued the State of South Carolina—a scenario which falls outside the literal boundaries of the Eleventh Amendment. Yet, it is clear that "[t]he Eleventh Amendment spells out one instance, but not the only one, in which respect and forbearance is due from the national to the state governments, a respect that cements our federation in the Constitution." *Hilton v. S.C. Pub. Ry. Comm'n*, 502 U.S. 197, 210 (1991) (O'Connor, J., dissenting).

The Commission attempts to distinguish this Court's decision in *Freytag*, in which the Court held that the Tax Court (an Article I court) "exercises its judicial power in much the same way as the federal district courts exercise theirs." *Freytag*, 501 U.S. at 891. The Commission incorrectly reads *Freytag* to apply only to non-Article III courts that perform exclusively judicial functions and not to non-Article III courts that perform multiple functions.

The non-judicial functions performed by the Commission are irrelevant to the question presented here. The Commission is "saturated with mixtures of legislative, executive, and judicial powers." 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.3, at 38 (3d ed. 1994).[10] The only issue before the Court is whether private complaint proceedings against a state implicate the state's sovereign immunity. Other aspects of the Commission's duties and responsibilities do not detract from the adversarial and judicial nature of the private complaint proceedings.

This Court's precedent establishes that Article I tribunals can and do exercise "the judicial power of the United States." *See, e.g., Freytag*, 501 U.S. at 889. In its brief before the Fourth Circuit, the Commission conceded that the Customs Service of the United States Department of Treasury—indisputably an executive department—performs functions that are properly characterized as "judicial." (Br. of Comm'n before 4th Cir. at 34); *see also Ex parte Bakelite Corp.*, 279 U.S. 438, 457-58 (1929) ("But [the Customs Court's] functions, although mostly quasi-judicial, were all susceptible of performance by executive officers, and had been performed by such officers in earlier times.").

Thus, the Fourth Circuit properly interpreted *Freytag* as standing for the proposition that "adjudication by adversarial

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[10] Likewise, James Madison was unsure of how to categorize the entire range of responsibilities exercised by the Comptroller within the Department of Treasury. 1 DAVIS, *supra*, at 39. As a result, Madison characterized this executive officer's duties as "executive, judicial, both, and neither." *Id.*

proceedings *can* exist outside the context of Article III," and "Article I tribunals may exercise the judicial power of the United States." (Pet. App. at 11a (citing *Freytag*, 501 U.S. at 889)).

B. The Commission's adversarial adjudication of private complaints against a state clearly implicates the state's sovereign immunity.

The Commission argues that the private complaint proceeding is not a "suit" as the term is used in the Eleventh Amendment and that the Commission merely exercises its executive powers through private complaint proceedings. (Br. for Comm'n at 23-25). As the Fourth Circuit aptly recognized, however, "[t]he fundamental fact, which [the Commission] cannot escape, is that this proceeding requires an impartial federal officer to adjudicate a dispute brought by a private party against an unconsenting state." (Pet. App. at 14a).

1. *A private complaint filed with the Commission initiates a suit within the scope of the doctrine of sovereign immunity.*

A review of the private complaint provisions of the Shipping Act confirms that the proceedings are adversarial adjudications that implicate sovereign immunity. The Shipping Act authorizes a private party to file a formal "complaint alleging a violation" of the Act, 46 U.S.C.A. app. § 1710(a), and seeking reparations and injunctive and other relief, *id.* §§ 1710(g) & (h). If the party sued does not satisfy the complaint, it must answer the complaint, and the Commission "shall investigate it" and "make an appropriate order." *Id.* § 1710(b). In "adjudicatory proceedings," the private complainant may utilize "depositions, written interrogatories, and discovery procedures," and to the extent practicable, the same rules applicable in federal district courts shall govern the proceedings. *Id.* § 1711(a). The Commission may issue subpoenas to "compel the attendance of witnesses and the production of books, papers, documents, and other evidence," *id.*, and if a party fails to comply, the Attorney General may

seek enforcement of the subpoena in the appropriate federal district court, *id.* § 1713(c). If the Commission orders reparations, the party may seek to enforce the order in the federal district court. *Id.* § 1713(d)(1).

A private complaint proceeding under the Act takes the form of an adjudication, 46 C.F.R. § 502.61, and the "case," *id.* § 502.147, is initially assigned to an administrative law judge ("ALJ"), *id.* § 502.223. The ALJ has the authority to order compliance with the discovery procedures outlined above, plus, "delineate the scope of a proceeding," "hear and rule upon motions," "administer oaths and affirmations," "examine witnesses," "rule upon offers of proof," "act upon petitions to intervene," "hear oral argument at the close of testimony," "fix the time period for filing briefs, motions, and other documents," and "dispose of any other matter that normally and properly arises in the course of the proceedings." *Id.* § 502.147. Any party may request an appeal from the ALJ's decision or the Commission may review the decision *sua sponte*. *Id.* § 502.227. As the Fourth Circuit found, the review is impartial. (Pet. App. at 16a).

Based on the applicable provisions of the Shipping Act and consistent with its earlier opinion in *NVR Homes, Inc. v. Clerks of the Circuit Courts for Anne Arundel County (In re NVR, LP)*, 189 F.3d 442, 451-54 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000), the Fourth Circuit properly concluded that "[t]he proceeding thus walks, talks, and squawks very much like a lawsuit." (Pet. App. at 15a). In-deed, "[t]he adjudication . . . is just that—an adjudication." *Id.*

Private suits filed against a state with the Commission are "judicial proceedings" within the ambit of the doctrine of sovereign immunity and the Eleventh Amendment. "The ALJ is thus not merely an alternate means of policy implementation," and to hold otherwise would be contrary to precedent and mandates in the Shipping Act. *Id.* at 16a; *see also Butz v. Economou*, 438 U.S. 478, 512-13 (1978)

(concluding that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process" to entitle the ALJ to judicial immunity).

This Court has defined a "suit" as "the prosecution, or pursuit, of some claim, demand, or request. . . . where the party suing claims to obtain something to which he has a right." *Cohens*, 19 U.S. (6 Wheat.) at 407-08. The Court looks to "the essential nature and effect of the proceeding." *Ford Motor Co. v. Dep't of Treasury,* 323 U.S. 459, 464 (1945)). Here, "'the role of the modern federal hearing examiner or administrative law judge . . . is "functionally comparable" to that of a judge.'" (Pet. App. at 16a (quoting *Butz*, 438 U.S. at 513)). "'[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Id.* (quoting *Butz*, 438 U.S. at 513).

The statutory provisions of the Act dispel the Commission's argument that the private complaint proceedings are not a suit, but merely an exercise of executive discretion. The complaint filed by Maritime Services with the Commission "initiated" an adversarial proceeding "pitting" the State against Maritime Services, a citizen of the State. *NVR Homes*, 189 F.3d at 454. Maritime Services' suit, seeking compensation for actual damages, interest, and attorney's fees, (J.A. at 16), "clearly sought a determination" from the Commission that the State owed it money, and a favorable decision would require the Commission, a federal agency, to raid the State's treasury. *NVR Homes*, 189 F.3d at 454.

Moreover, the Commission actually has no discretion to accept or reject the private complaint as part of some policy decision. The relevant statutory and regulatory provisions require the Commission to refer the private complaint to an ALJ for an impartial adjudication. 46 U.S.C.A. app. § 1710(b); 46 C.F.R. §§ 502.61, 502.223. The only executive

discretion exercised by the Commission occurs when it conducts its own investigation and makes its own independent judgment as to whether it will initiate an action.[11] *See Alden*, 527 U.S. at 759-60 ("The difference between a suit by the United States . . . and a suit by the [private party] implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State" in the exercise of its official discretion.).[12]

2. *The Commission's lack of independent enforcement powers does not affect the States' sovereign immunity.*

The ultimate unenforceability of a Commission order against a state further supports the Fourth Circuit's con-

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[11] While the Shipping Act authorizes the Commission to initiate its own investigation and bring suit against the Ports Authority to enforce provisions of the Act, Congress does not have the power to permit a private party to hale a nonconsenting state before a federal administrative tribunal. *See Blatchford*, 501 U.S. at 785.

[12] The Commission cites *Upshur County v. Rich*, 135 U.S. 467 (1890), for the proposition that administrative proceedings, as opposed to judicial proceedings, are carried on by executive officers as part of their official duties and cannot be characterized as a suit. (Br. for Comm'n at 23). In *Upshur County*, although this Court determined that an appeal of a property tax assessment is not a suit that may be removed to federal court, an analysis of the case reveals that it provides no support for the Commission's argument. *See Upshur County*, 135 U.S. at 477 ("the valuation of property for the just distribution of taxes or assessments[] is purely administrative in its character, and cannot, in any just sense be called a 'suit'"). In concluding its decision, this Court recognized that "such an appeal may become a suit, if made to a court *or tribunal having power to determine questions of law and fact*, either with or without a jury, and *there are parties litigant to contest the case on the one side and the other.*" *Id.* (emphasis added). As the Fourth Circuit properly concluded, private complaint proceedings before the Commission are lawsuits that implicate sovereign immunity concerns. The administrative law judge issues an order with both legal and factual findings. *See* discussion *supra* pp. 34-36 regarding the judicial nature of private complaint proceedings.

clusion that the States' sovereign immunity applies in federal administrative proceedings. The Shipping Act permits successful complainants to enforce their reparation awards through the "district court having jurisdiction of the parties." 46 U.S.C.A. app. § 1713(d). However, the doctrine of sovereign immunity and the Eleventh Amendment bar such enforcement proceedings against a state.[13] Thus, any reparations awarded to a private litigant in a suit against a state would be unenforceable in the district court and would render the Commission's award futile. A private party's inability to enforce a reparations award further compels the conclusion that a private party could never sue a state in the first instance.

The United States argues that the federal administrative proceeding does not implicate the States' sovereign immunity because the award would not be enforceable in federal district court against a state. (Br. for United States at 18-21). This argument ignores the scope of sovereign immunity and narrowly interprets immunity to protect the States merely from the execution of a judgment rather than from the litigation itself. Moreover, the United States' position would allow Congress to eviscerate the States' sovereign immunity by authorizing private actions against the States as long as any judgment awarded could not be executed by formal legal process initiated by a private litigant.

Contrary to the United States' position, the immunity is from suit, not simply from the execution of a judgment. Sovereign immunity not only protects the pockets of the States' treasuries, but also prevents the States from being hauled into court against their will. *See, e.g., Seminole Tribe*, 517 U.S. at 58. A state's fundamental right to be immune

[13] Given Congress' presumed awareness of the Eleventh Amendment's bar to the district court's exercise of jurisdiction over the States, Congress did not intend for the Shipping Act to permit private actions against the States.

from suit is undermined the moment a private suit is filed against the nonconsenting state and the state is called upon to appear and answer the suit as an unwilling defendant, not when the state is asked to pay a judgment awarded against it. *See Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) ("A state's *freedom from litigation* was established as a constitutional right through the Eleventh Amendment.").

Finding that the States' sovereign immunity is not implicated in private suits before federal administrative tribunals simply because a State could ignore any agency order due to insufficient enforcement authority "does not do justice to our system of federalism." (Pet. App. at 18a). It would be incredible to assume that a state officer who takes an oath to support and defend the Constitution and laws of the United States would be unwilling to obey an order of a federal agency. *See id.* As the Fourth Circuit found below, the proper question is not whether the Commission has the power to enforce its orders, but rather "whether a private party can subject an unconsenting state to an adversarial proceeding." *Id.*

C. Allowing the Commission to adjudicate private party complaints against a nonconsenting state would improperly raise up proceedings which were "anomalous or unheard-of" when the Constitution was adopted.

The Commission argues that because private complaint proceedings before federal administrative agencies did not exist at the time the Constitution was adopted and because no express constitutional provision addresses sovereign immunity from federal administrative proceedings, this Court must conclude that such proceedings do not implicate sovereign immunity guarantees. (Br. for Comm'n at 27). This argument should be rejected. The original Constitution is silent on the question of the sovereign immunity for both the States and the United States.

Indisputably, "no anomalous or unheard-of proceedings . . . were to be raised up by the Constitution." *Hans*, 134 U.S. at 18, *quoted in Alden*, 527 U.S. at 727. The Commission's argument concedes that private suits against a state filed with a federal administrative agency did not exist at the time the States adopted the Constitution. This fact further compels the conclusion that private litigants may not utilize these "anomalous" and "unheard-of" proceedings to strip the States of their sovereign immunity.

The Commission unsuccessfully attempts to distinguish *Alden*, which provides persuasive support for the State's position here. The Commission argues that *Alden* does not support an assertion of sovereign immunity from "Executive Branch regulatory authority." (Br. for Comm'n at 29). However, the Commission mischaracterizes the private complaint proceedings. As previously discussed and established, the Commission does not exercise executive discretion in adjudicating private complaints under the Shipping Act.[14] To the contrary, the administrative law judge must hear and adjudicate the complaint, and the ALJ's functions as well as the nature of the proceedings are judicial.[15] The controlling principle from *Alden* is that a private party may not hale an unwilling state into an adversarial proceeding, "regardless of the forum." *See Alden*, 527 U.S. at 749.[16]

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[14] The Commission exercises its executive, regulatory authority when it initiates its own investigation and files suit under the Shipping Act, but not when a private party files a complaint which the Commission *must* adjudicate.

[15] *See* discussion *supra* Part III.B.1. regarding private complaint proceedings and the role of the administrative law judge who presides over the proceedings.

[16] The Commission's reliance upon *Nevada v. Hall* is also misplaced. In *Hall*, this Court rejected Nevada's claim of sovereign immunity from a private suit brought in California state court. The suit alleged violations of California state law, which allowed private suits against other states. *Hall*, 440 U.S. at 411-12. *Hall* involved whether one state may abrogate another state's immunity, and not whether the United States, through Congress, may abrogate the States' immunity in state courts. Thus, this Court noted that the cases holding that the States are never amenable to suits without their consent "all . . . concerned questions of federal-court jurisdiction and the extent to which the States . . . authorized federal suits against themselves" when they ratified the Constitution. *Id.* at 420-21. This Court narrowly interpreted *Hall* in *Alden*, when it held that the States enjoy sovereign immunity from private suits in their own courts. In rejecting *Hall* as a basis for denying the States their sovereign immunity in their own courts, this Court explained that the federal government can claim only those powers granted to it by the Constitution, and concluded that Congress had no right to abrogate the States' immunity in their own courts. *See Alden*, 527 U.S. at 739. *Hall* does not help the Commission in the present case for similar reasons—"the decision addressed neither Congress' power to subject States to private suits nor the States' immunity from suit in" federal administrative proceedings. *See Alden*, 527 U.S. at 739.

D. The public rights doctrine does not affect the States' sovereign immunity.

The Commission erroneously relies upon the public rights doctrine[17] as support for its position that the States' sovereign immunity is not implicated by private complaint proceedings before federal administrative tribunals. The argument improperly mingles two separate and distinct constitutional principles.

The Commission asserts the unsupported argument that because the public rights doctrine prevents Congress from impermissibly eroding the judicial power of Article III courts by placing judicial authority in an Article I tribunal, the doctrine is also sufficient to ensure "that Congress

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[17] The public rights doctrine provides a justification for Congress' delegation of certain claims to non-Article III tribunals in certain circumstances. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (observing that "[i]n essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced").

cannot undermine the principles of sovereign immunity that protect States from the jurisdiction of Article III courts." (Br. for Comm'n at 35). The Commission is apparently arguing that because the public rights doctrine limits Congress' authority to grant Article I tribunals the judicial authority vested in Article III courts, an action brought against a nonconsenting state in an Article I tribunal is not a judicial action and does not implicate sovereign immunity concerns. The Commission's argument would transform the public rights doctrine into a vehicle for overriding the States' sovereign immunity by permitting Article I tribunals to decide adversarial cases that are beyond the reach of Article III courts.

This argument is merely another articulation of the Commission's mistaken position that the States' sovereign immunity is limited by the forum in which the action is brought—a position soundly rejected by this Court two terms ago. *See Alden*, 527 U.S. at 749. As the Fourth Circuit properly found below, "[i]nvoking the public rights doctrine, however, does not change the fact that a private party simply cannot commence an adversarial proceeding against an unconsenting state." (Pet. App. at 18a n.*).

In rejecting the Commission's public rights argument, the Fourth Circuit recognized that Article I tribunals can and do exercise the judicial power of the United States and are limited in their exercise of that power by "the constitutional jurisdiction of Article III courts." *Id.* The public rights doctrine itself rests on the supervision of Article I tribunals by Article III courts. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853-54 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985); *Crowell v. Benson*, 285 U.S. 22, 61 (1932). "Because an Article III court would not have jurisdiction due to state sovereignty, [Supreme Court] cases suggest that sovereign immunity would also bar Congress from permitting a federal

agency to force a state to defend a claim against a private party." (Pet. App. at 19a n.* (referring to cited cases decided by this Court)).

The Commission's public rights argument is an impermissible attempt to borrow concepts from one constitutional principle and apply them on an unrelated front. The constitutional guarantee to litigants that a case or controversy within the scope of the judicial power of the United States will be decided by or under the supervision of an Article III judge in an Article III court is wholly separate and finds its roots in a different place than the States' fundamental right of immunity from private suits without their consent.

For example, the legitimacy of federal bankruptcy proceedings relies, in part, on the public rights doctrine and this Court's holdings that Article III power can in certain circumstances be applied by a non-Article III judge, *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), yet federal courts uphold the States' assertions of their sovereign immunity in bankruptcy proceedings. *See, e.g., NVR Homes*, 189 F.3d at 450-54; *Texas v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998) (noting that adversary proceedings initiated against a state during the bankruptcy process would offend the Eleventh Amendment)

The public rights doctrine simply has no application to the question before the Court, and the Court should decline the invitation by the Commission and the United States to apply it in this context.

IV. NONE OF THE EXCEPTIONS TO STATE SOVEREIGN IMMUNITY RECOGNIZED BY THIS COURT APPLIES IN THIS CASE.

Although this Court has recognized limitations "implicit in the constitutional principle of state sovereign immunity," *Alden*, 527 U.S. at 755, none of the exceptions applies here.

A. Congress did not abrogate the States' immunity in the Shipping Act.

A state's sovereign immunity does not apply where Congress has validly abrogated the States' immunity pursuant to section 5 of the Fourteenth Amendment. *See Alden*, 527 U.S. at 756. Whether Congress has validly abrogated the States' immunity requires a two-step analysis. First, did Congress unequivocally express an intent to abrogate the States' immunity in the Shipping Act? *See, e.g., Kimel*, 528 U.S. at 73 (holding that Congress' intent must be "unmistakably" clear). Second, if the answer to question one is yes, did Congress act pursuant to a valid exercise of its abrogation power? *See, e.g., Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-64 (2001). The Court finds that Congress validly abrogated the States' sovereign immunity only when both questions are answered affirmatively.

1. *The Shipping Act contains no clear expression of congressional intent to abrogate the States' immunity.*

The Eleventh Amendment is an essential component of our Constitution's structure; and therefore, the test for determining whether Congress has expressed its intent to abrogate the States' immunity is a stringent one. *See Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989). "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.'" *Seminole Tribe*, 517 U.S. at 56 (quoting *Blatchford*, 501 U.S. at 786).

The Shipping Act contains no expression of any congressional intent to abrogate the States' sovereign immunity from suits filed by private parties. *See generally* Shipping Act of 1916, 46 U.S.C.A. app. §§ 801-842 (West 1975 & Supp. 2001); 46 U.S.C.A. app. §§ 1701-1719. The Act contains no reference to either the Eleventh Amendment or to sovereign immunity. Given the stringent standard required by this Court, Congress certainly knows how to express its intent to

abrogate, and the absence of any abrogation language is conclusive evidence that Congress did not intend to abrogate the States' immunity through the Shipping Act.[18]

Because Congress did not express any intent to abrogate the States' sovereign immunity in the Shipping Act, this case does not call into question any exercise of congressional power. The issue in this case—whether a State retains its sovereign immunity from private suits before federal administrative tribunals—does not address any specific congressional exercise of its abrogation powers. Contrary to the Commission's assertion, a positive answer to this question does not impact the constitutionality of the Shipping Act.

The Commission boldly states: "The court of appeals held that Congress exceeded the scope of its authority when it enabled private persons to initiate proceedings before the Commission by complaint." (Br. for Comm'n at 17). This statement is untrue and reflects a misreading of the Fourth Circuit's decision. Because Congress never expressed any intent to abrogate the States' sovereign immunity under the Shipping Act, the Fourth Circuit did not examine any congressional exercise of its abrogation authority. Further, the Fourth Circuit did not find that private complaint proceedings in general are unconstitutional. The Shipping Act remains intact under the Fourth Circuit's decision because the court merely held that private complaint proceedings before the Commission implicate the States' sovereign immunity.

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[18] For example, in *Kimel* and *Garrett*, this Court found that Congress clearly expressed its intent to abrogate the States' immunity under the ADEA and ADA, respectively. Because the Court found that Congress' attempted abrogation exceeded the scope of its authority, the Court found the abrogation contained in those statutes unconstitutional.

2. *The Shipping Act would not constitute a valid exercise of Congress' abrogation power.*

In determining whether Congress has the power to abrogate the States' immunity, the question for the Court is a narrow one—"was the act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" *Seminole Tribe*, 517 U.S. at 1125 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976)).

This Court recognizes Congress' power to abrogate the States' sovereign immunity only in appropriate legislation enacted pursuant to section 5 of the Fourteenth Amendment. *See, e.g., Fitzpatrick*, 427 U.S. at 453; *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639-40 (1999). However, no meritorious argument can be made that Congress enacted the Shipping Act to protect substantive rights guaranteed by the Fourteenth Amendment. The Shipping Act nowhere identifies any violations of substantive rights which it aims to remedy and protect. Thus, any intent to abrogate the States' immunity through the Shipping Act would clearly be pursuant to Congress' Article I powers to regulate ocean borne commerce. The Commission concedes that Congress enacted the Shipping Act because "the regulation of ports" was "essential to protecting the nation's oceanborne commerce." (Pet. App. at 33a). *Seminole Tribe*, however, forecloses any attempt by Congress to abrogate the States' immunity pursuant to Article I. *See Seminole Tribe*, 517 U.S. at 72-73; *see also Kimel*, 528 U.S. at 78-79. Therefore, Congress did not abrogate the States' sovereign immunity through the Shipping Act.

B. No other recognized exception to sovereign immunity applies in this case.

Neither the Commission nor the United States challenges the right of the Ports Authority, as an arm of the State, to assert the sovereign immunity of the State of South Carolina. In *Ristow*, the Fourth Circuit held that the Ports Authority is "the alter ego of the State of South Carolina," and therefore, is entitled to

Eleventh Amendment immunity. *Ristow*, 58 F.3d at 1053-55 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). Moreover, it is undisputed that the State of South Carolina has not waived its immunity from or consented to private suits for alleged violations of the Shipping Act.

Although a state does not enjoy immunity in a suit filed by the federal government or another state, *see Alden*, 527 U.S. at 755-56, a private citizen filed this action against the Ports Authority. Sovereign immunity also does not bar suits against state officers where the complaint seeks only injunctive or declaratory relief to remedy an ongoing violation of federal law. *Ex parte Young*, 209 U.S. 123, 167 (1908). Maritime Services, however, has not named any state officers, and its complaint seeks monetary relief against the State. (J.A. at 7, 15-16). Finally, sovereign immunity does not apply in certain private suits against state officials individually, *Alden*, 527 U.S. at 757, but Maritime Services does not name any state officer in its complaint. (J.A. at 7). Thus, no exception to South Carolina's constitutional right to assert its immunity applies in this case.

C. The federal interest in uniform regulation of maritime matters does not support an additional exception to the States' constitutional right to sovereign immunity.

The Commission invites the Court to create a new exception to the doctrine of sovereign immunity by holding that the federal interest in maritime commerce can override the States' sovereign immunity. (Br. for Comm'n at 29-33). The Fourth Circuit properly refused this invitation. (Pet. App. at 22a-24a). As the Court has repeatedly recognized, the States' sovereign immunity applies equally to proceedings in the admiralty and maritime context. *See Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 488-90 (1987); *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 698-99 (1982) (opinion of Stevens, J.); *In re New York*, 256 U.S. 490,

497-98 (1921). Thus, the States' immunity from suit applies regardless of any "national uniformity in the regulation of maritime commerce." (Br. for Comm'n at 33).

In rejecting the Commission's invitation to create a new exception to sovereign immunity based upon the federal interest in uniform regulation of maritime matters, the Fourth Circuit followed *Seminole Tribe's* clear instruction "that a strong federal interest in a particular subject cannot determine the application of sovereign immunity to a lawsuit." (Pet. App. at 22a). Similarly,

> [T]he fact that the Constitution assigns the federal government a primary role in the regulation of maritime commerce does not mean that Congress can authorize a private party to bring a complaint against an unconsenting state. Once sovereign immunity applies, the only exceptions are those recognized in *Alden*.

Id. at 23a.

The Commission's ancillary argument that the States must be stripped of their sovereign immunity because private complaint proceedings are necessary "regulatory tool[s] to ensure that state marine terminals comply with the Shipping Act's requirements," [19] is equally without merit. (Br. for Comm'n at 11). The Commission erroneously suggests that its lack of resources justifies overriding the States' constitutional right to assert its sovereign immunity. *Id.* at 37.

A sovereign's assertion of its immunity does not depend upon the potential impact on the forum in which it is asserted. The States are clothed with the protections of immunity from suit by private parties "regardless of the forum," *Alden*, 527 U.S.

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[19] The United States, however, concedes that the Fourth Circuit's decision "should have little practical significance for the enforcement of the Shipping Act." (Br. for United States in Opp'n to Pet. for Cert. at 11); *see also id.* at 20 (ruling will have little effect on the Commission's enforcement of the Act); *id.* at 21 n.9 (ruling is "unlikely to have any meaningful practical effect").

at 749, and regardless of a *claim* that such immunity might impede the manner in which the forum operates. Sovereign immunity is a constitutional guarantee, overriding any and all subordinate considerations.

In any event, application of the doctrine of sovereign immunity to the Commission's administrative proceedings will not impair its ability to carry out its duties in any respect. First, regardless of the holding in this case, the Commission remains free to "bring a complaint in its own name." (Pet. App. at 23a (citing 46 U.S.C.A. app. § 1710(c)). State-owned marine terminals will still be required to comply with the Shipping Act's provisions designed to ensure the existence of an efficient and economic transportation system in the Nation's ocean borne commerce.[20] 46 U.S.C.A. app. § 1701(2).

The Commission relies upon *California v. United States*, 320 U.S. 577, 586 (1944), in which this Court held that the Shipping Act applies to state marine terminals, and claims that the case underscores a "crucial" need for "both public and private marine terminals [to] be regulated by the Act." (Br. for Comm'n at 37). However, the Commission fails to

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[20] Specifically, the Act requires marine terminal operators "to establish, observe, and enforce just and reasonable regulations and practices," 46 U.S.C.A. app. § 1709(d)(1), and to refrain from unreasonably prejudicing or preferring any person, *id.* § 1709(d)(2). If a ports authority, including a state ports authority, violates these (or any other) provisions of the Shipping Act, the Commission is statutorily authorized to investigate the alleged violations, either upon its own initiative or upon information supplied by a private party. *Id.* § 1710(c); *see also* 46 C.F.R. § 501.5 (responsibilities of the Bureau of Enforcement); 46 C.F.R. §§ 502.281-291 (nonadjudicatory investigations). If the Commission's investigation finds a violation of the Act, the Commission may issue a cease-and-desist order, assess penalties, or both. 46 U.S.C.A. app. §§ 1713 (issuance of orders) & 1712(a) (allowing penalties of up to $5,000 per violation and $25,000 for willful violations). In the last decade, the Commission has initiated over 2,000 formal investigations and collected over $66 million in civil penalties. *See* 1990-2000 FED. MAR. COMM'N ANN. REPS. (Appendix at 3a).

recognize the pivotal distinction between *California* and the instant case. In *California*, the United States—not a private citizen—commenced suit against the State. This distinction is significant and highlights the fundamental difference between a valid exercise of the federal government's authority over the States and an unconstitutional attempt by a private party to play the role of the United States.[21] As the Fourth Circuit properly recognized below, "[t]he fact that sovereign immunity applies to private proceedings means only that the federal government, not a private party, must vindicate the federal interest when a state is involved." (Pet. App. at 23a).

Second, the Commission's claim that its regulation of ocean borne commerce depends upon oversight through private party suits is irrelevant to the efficacy of the doctrine of sovereign immunity. Alleged insufficient resources cannot serve as a basis for stripping the States of their constitutional right to immunity from private party suits. The doctrine of sovereign immunity, embodied in the Eleventh Amendment, requires the Commission to regulate through its own constitutionally permissible investigatory procedures as provided by Congress in the Shipping Act. If the Commission lacks adequate personnel to regulate effectively in this manner (and there is no such showing here), it should seek additional resources from Congress. "This process ensures that any federal interest is protected in a politically accountable manner." (Pet. App. at 24a).

A legislative need cannot erode a constitutional guarantee. Accordingly, the federal interest in maritime commerce does not trump the States' sovereign immunity.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

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[21] *See supra* note 11 and accompanying text.

Respectfully submitted,

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January 11, 2002

APPENDIX A

STATUTORY PROVISIONS

Section 2(2) of the Shipping Act of 1984, 46 U.S.C. app. § 1701(2), provides:

§ 1701. Declaration of policy

The purposes of this chapter are—

. . .

(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;

Sections 10(d)(1) and (d)(2) of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(d)(1) & (d)(2), provide:

§ 1709. Prohibited acts

(d) Common carriers, ocean transportation intermediaries, and marine terminal operators

(1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

(2) No marine terminal operator may agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, any common carrier or ocean tramp.

Section 13(a) of the Shipping Act of 1984, 46 U.S.C. app. § 1712(a), provides:

§ 1712. Penalties

(a) Assessment of penalty

Whoever violates a provision of this chapter, a regulation issued thereunder, or a Commission order is liable to the United States for a civil penalty. The amount of the civil penalty, unless otherwise provided in this chapter, may not exceed $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate offense. The amount of any penalty imposed upon a common carrier under this subsection shall constitute a lien upon the vessels operated by that common carrier and any such vessel may be libeled therefore in the district court of the United States for the district in which it may be found.

APPENDIX B

Federal Maritime Commission Enforcement Activities: 1990-2000.

Fiscal Year	Formal Investigations Initiated by the FMC	$ Collected in Civil Penalties
1990	289	$ 24,982,901.28
1991	191	$ 21,791,650.09
1992	308	$ 653,712.39
1993	295	$ 2,063,435.82
1994	396	$ 870,463.88
1995	134	$ 381,912.63
1996	50	$ 876,959.68
1997	163	$ 1,943,349.04
1998	290	$ 3,869,005.96
1999	126	$ 5,411,030.17
2000	54	$ 3,232,481.12
Total	**2296**	**$ 66,076,902.06**

Source: Federal Maritime Commission, Annual Reports, 1990-2000

APPENDIX C

Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices

Federal agencies are not included in the phrase "person or other entity" in the antidiscrimination provision of the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1). Accordingly, the Special Counsel for Immigration Related Unfair Employment Practices is without authority to bring discrimination charges against federal agencies.

August 17, 1992

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF THE NAVY

This memorandum responds to your request that we reconsider our opinion of May 2, 1990, in which we concluded that the Antidiscrimination Provision of the Immigration Reform and Control Act, 8 U.S.C. § 1324b(a)(1), authorizes the Special Counsel for Immigration Related Unfair Employment Practices to investigate and prosecute charges of employment discrimination by federal agencies. After evaluating your request for reconsideration and the response of the Special Counsel, we conclude that the federal government is not a "person or other entity" covered by the Antidiscrimination Provision. We withdraw our earlier opinion.[1]

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[1] *See* Memorandum for Andrew M. Strojny, Acting Special Counsel, from Lynda Guild Simpson, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Department of Defense Cooperation with Investigation of Immigration Related Unfair Employment Practice*, (May 2, 1990) ("OLC Memorandum"); Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Craig S. King, General Counsel, Department of the Navy (May 17, 1990) ("Navy Memorandum"); Memorandum for J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, from

I.

The Antidiscrimination Provision of the Immigration Reform and Control Act ("IRCA") provides that:

> [i]t is an unfair immigration-related employment practice for a *person or other entity* to discriminate against any individual (other than an unauthorized alien . . .) with respect to the hiring, or recruitment or referral for a fee, of [an] individual for employment or the discharging of [an] individual from employment—
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual . . . , because of such individual's citizenship status.

8 U.S.C. § 1324b(a)(1) (emphasis added). Under IRCA's enforcement provisions, the Special Counsel for Immigration Related Unfair Employment Practices ("Special Counsel") may file charges against any "person or other entity" for violation of the Antidiscrimination Provision. Such charges initially come before an administrative law judge ("ALJ") within the Department of Justice. *Id.* § 1324b(d)(1). In the event that the Special Counsel does not file charges with the ALJ within a specified time, the private claimant may do so directly. *Id.* § 1324b(d)(2).

If the ALJ finds that the defendant "person or other entity" has violated the Antidiscrimination Provision, the ALJ may order injunctive relief, back pay, and civil penalties. *Id.* § 1324b(g)(2)(B)(iii)-(iv). Any "person aggrieved" by the ALJ's order may seek review in the appropriate court of appeals, *id.* § 1324b(i)(1), and the district court may enforce the ALJ's order on petition by the Special Counsel or by the private claimant. *Id.* § 1324b(j)(1).

Andrew M. Strojny, Acting Special Counsel (June 1, 1990) ("Special Counsel Memorandum").

The events that gave rise to our consideration of this matter began when Dr. Jacob Roginsky, a naturalized United States citizen who emigrated to this country from the Soviet Union, filed allegations with the Special Counsel that the Navy had engaged in immigration-related unfair employment practices prohibited by the Antidiscrimination Provision. The Special Counsel commenced an investigation into Dr. Roginsky's charges. The Navy declined to cooperate with this investigation, arguing that the Antidiscrimination Provision does not apply to federal agencies and, hence, that the Special Counsel lacked authority to investigate. Acting on a request from the Special Counsel, we issued our opinion of May 2, 1990, in which we concluded that the Special Counsel had authority to pursue the investigation. The Navy then requested that we reconsider our opinion. *See* Navy Memorandum at 13; *see also* Special Counsel Memorandum at 1.

Thereafter, Dr. Roginsky filed an administrative claim directly against the Navy. As a result, the Special Counsel no longer had authority to file an administrative claim on behalf of Dr. Roginsky. *See* 28 C.F.R. § 44.303(d). We also understand that the dispute involving Dr. Roginsky has been settled. The precise question addressed by our opinion of May 2, 1990—whether the Special Counsel may investigate the charges of immigration-related unfair employment practices brought by Dr. Roginsky against the Navy—thus is no longer at issue.

The Special Counsel informs us that the complaint by Dr. Roginsky was the first in which the Special Counsel has been required to address the applicability of IRCA to a federal government department or agency. Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel at 3 (May 7, 1990). The Special Counsel also notes that "[b]ecause the overwhelming majority of federal jobs are restricted [to United States citizens] by statute, regulation or

executive order . . . there cannot be a very large number of meritorious charges." Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel at 7 (Apr. 27, 1990).[2] We nonetheless reconsider the interpretation of IRCA set forth in our earlier opinion because the applicability of that act to federal agencies is an issue of importance.

II.

The applicability of IRCA to federal agencies turns on whether federal agencies are "person[s] or other entit[ies]" within the meaning of the Antidiscrimination Provision. The phrase "person or other entity" is not defined in IRCA. This broad language might ordinarily be understood to include not only natural persons but virtually all organizations, including public agencies. Our earlier opinion, in fact, rested primarily on the view that "the plain meaning of the phrase 'person or other entity' encompasses . . . 'entit[ies]' such as the United States Government." OLC Memorandum at 3.

On further review, however, we believe that our earlier analysis did not adequately address the sovereign immunity implications of a "plain meaning" interpretation of the phrase and, in particular, on the settled rules of statutory construction that have evolved to preserve sovereign immunity. It is well established that:

> [s]tatutory provisions which are written in such general language that they are reasonably susceptible to being construed as applicable both to the government and to private parties are subject to a rule of construction which

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[2] The Special Counsel has informed us that one other "former Soviet citizen has filed a charge against the [Department of Defense]" and that this investigation is "on hold" pending reconsideration of our May 2, 1990 opinion. *See* Memorandum for J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, from Andrew M. Strojny, Acting Special Counsel at 2 (Aug. 15, 1990).

> exempts the government from their operation in the absence of other particular indicia supporting a contrary result in particular instances.

3 Norman J. Singer, *Sutherland on Statutory Construction*, § 62.01 (5th ed. 1992 rev.); *accord United States v. United Mine Workers of America*, 330 U.S. 258, 272 (1947); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). Therefore, the phrase "person or other entity" should not be read to include federal agencies in the absence of affirmative evidence that Congress intended that they be included. As discussed below, not only is there no evidence that Congress intended to include federal agencies within the phrase "person or other entity," there is considerable evidence that Congress did not intend federal agencies to be included in this term.

III.

Enforcement of the Antidiscrimination Provision against the federal government plainly would implicate the sovereign immunity of the United States. Sovereign immunity bars an action against the United States if "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963)(quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949)).[3] The Antidiscrimination Provision authorizes ALJs to enter an order awarding back pay, which would

[3] We assume for purposes of this opinion that sovereign immunity would not bar administrative proceedings in which one executive agency would press charges against another executive agency and final decisional authority would be vested in the Executive. *See* Special Counsel Memorandum at 8-9, 19. We do not believe, however, that this assumption bears on the specific question presented here, because disputes under IRCA are subject to judicial enforcement procedures and thus are not resolved entirely within the executive branch. *See supra* p. 122.

expend itself on the Treasury, or an order requiring the hiring of individuals, which would restrain the United States Government from acting or compel it to act. 8 U.S.C. § 1324b(g)(2)(B)(iii). It also provides for judicial enforcement of such orders by the district courts. *Id.* § 1324b(j). Therefore, the Antidiscrimination Provision may be applied to federal agencies only if Congress has waived the government's sovereign immunity against enforcement actions under section 1324b(j).[4]

In determining whether Congress has waived sovereign immunity, "[i]t is an error to suppose that the ordinary canons of statutory construction are to be applied." *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1387 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983). In particular, the Supreme Court has held that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969); *see also United States v. Mitchell*, 445 U.S. 535, 538 (1980). This requirement of an unequivocal expression of a waiver of sovereign immunity has recently been reaffirmed in a number of decisions. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); and *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89,

[4] The Antidiscrimination Provision also contemplates judicial enforcement of civil penalties, 8 U.S.C. § 1324b(g)(B)(iv), (j), payable into the Treasury. The assessment of a civil penalty against a federal agency in a sense would *not* expend itself upon the fisc, because it would not have any net effect on the Treasury balance. Nor would the assessment of a civil penalty against an agency serve the goal of deterrence. Because there are no appropriations in agency budgets for payment of IRCA penalties, the funds to pay such penalties presumably would be drawn from the general fund of the Treasury, 31 U.S.C. § 1304(a), and then returned to that same fund as miscellaneous receipts, 8 U.S.C. § 1356(c), with no effect whatsoever on the defendant agency. The fact that application of the Antidiscrimination Provision to federal agencies would render one aspect of the enforcement scheme ineffectual provides independent reason to question the application of the provision to these agencies.

95 (1990).[5] As a general matter, waivers of sovereign immunity take the form of explicit statements that the federal government is subject to a statutory rule or will be subject to suit.[6] Statutes explicitly providing a right of action against a federal entity or conferring jurisdiction on a court to resolve

[5] The Special Counsel cites two Supreme Court cases on the standard for waivers of sovereign immunity, but neither is relevant in the present context. *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939), involved a claim against a government corporation. It has long been recognized that government corporations may be sued in the same manner as private corporations. *Id.* at 390. The application of IRCA contemplated here, however, would involve neither a government corporation nor any other specialized organizational form the use of which would subject the United States to suit. In *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512 (1984), the scope rather than the existence of a waiver of sovereign immunity was at issue. The Court cited *Keifer* for the proposition that "intent to waive immunity . . . can only be ascertained by reference to underlying congressional policy." *Id.* at 521.

[6] *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e16(a); Clean Air Act, 42 U.S.C. §§ 7418(a), 7604(a)(1); Clean Water Act, 33 U.S.C. §§ 1323, 1365; Resource Conservation and Recovery Act, 42 U.S.C. §§ 6961, 6972(a)(1)(a); Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9620(a).

The Secretary of Labor's decision in *Pogue v. Department of the Navy*, Secretary of Labor Case No. 87-ERA-21 (May 10, 1990), on which the Special Counsel relies, is not to the contrary. The determination that sovereign immunity does not shield the federal government from the "whistleblower" provision of CERCLA rested on the applicable statutory definition of "person," which expressly includes the "United States Government." 42 U.S.C. § 9601(21). Congress, moreover, expressly provided that "[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter [including the whistleblower provision] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." *Id.* § 9620(a)(1).

claims against the federal government also have been held to constitute waivers of sovereign immunity.[7]

IRCA does not contain any waiver of sovereign immunity in the form of a substantive rule that explicitly applies to the United States. Nor is there any specific grant of jurisdiction to resolve claims against the federal government. In these respects, the contrast between IRCA and Title VII of the Civil Rights Act of 1964 is especially instructive on Congress's intent in enacting IRCA. Unlike in IRCA, Congress expressly brought within the ambit of Title VII federal "executive agencies as defined in section 105 of title 5," 42 U.S.C. § 2000e-16(a), and it did so because otherwise a claimant would have to "overcome a U.S. Government defense of sovereign immunity." S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1971). The absence of any reference to the federal government in IRCA is particularly significant in light of the settled law prior to IRCA's enactment that Title VII provides the *exclusive* remedy against federal agencies for complaints of national origin discrimination. *See Brown v. General Services Admin.*, 425 U.S. 820, 829 (1976). Despite extensive discussion of the relationship between IRCA and Title VII with respect to private employers, there is no evidence in the committee reports on IRCA that Congress intended IRCA to supplement the exclusive Title VII remedy against federal agencies. *See* H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 69-70 (1986); *id.*, pt. II, at 12; *see also* Navy Memorandum at 11; *infra* pp. 127-28. Accordingly, we conclude that Congress has not waived the sovereign immunity of the United States for claims under IRCA.

[7] *See Schlafly v. Volpe*, 495 F.2d 273, 282 (7th Cir. 1974) (finding waiver of sovereign immunity in right of action to contest discriminatory suspension of federal financial assistance in 42 U.S.C. § 2000d-2); *McKenzie v. United States*, 536 F.2d 726, 728 (7th Cir. 1976) (finding waiver of sovereign immunity in express grant of jurisdiction to bankruptcy courts to resolve federal tax liability of bankrupt entities under 11 U.S.C. § 11(a)(2A)).

In our prior opinion, we relied upon the exception to the Antidiscrimination Provision of IRCA for discriminatory actions required by executive order, section 1324b(a)(2)(C), to support our conclusion that federal agencies were covered by IRCA. We reasoned there that "the creation of an exception for discrimination required by [executive] orders strongly suggests that Congress understood federal agencies otherwise to be within the scope of the antidiscrimination provision" because "executive orders govern the employment decisions of the federal government rather than those of private entities." OLC Memorandum at 4. It is clear that we were proceeding at that point in the opinion on an assumption that executive orders never govern actions of private employers. In fact, however, some executive orders do affect private parties. For example, Executive Order No. 10865, 3 C.F.R. § 62 (1960), *reprinted in* 50 U.S.C. § 435 note, effectively forbids certain private employers conducting business with the government from hiring individuals who, due to their citizenship status, could not obtain the requisite security clearance.[8]

[8] Section 1(a) of Executive Order No. 10865, requires the issuance of regulations to govern "releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, [government] contracts." These regulations require security clearances for private employees to whom classified information may be released. *See, e.g.*, 10 C.F.R. pt. 710 (security clearance program for contractors handling nuclear material); 32 C.F.R. pt. 155 (security clearance program for defense contractors).

The Special Counsel asserts that Congress enacted the exception for executive orders specifically to address Executive Order No. 11935, 3 C.F.R. 146 (1977), *reprinted in* 5 U.S.C. § 3301 note, which provides that "[n]o person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States." *See* Special Counsel Memorandum at 4. The Special Counsel cites no authority in support of this assertion, and we have discovered none.

Having focused on the fact that some executive orders do extend to private employers, we believe that the exception for "executive orders" must be understood as directed at "discrimination" by government contractors pursuant to executive orders such as No. 10865, not at the actions of federal government agencies. This is the more natural understanding of the exception, given that it appears among other exceptions that apply to discrimination by government contractors. It is merely one of several exceptions for decisions made on the basis of citizenship status that are "required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government." 8 U.S.C. § 1324b(a)(2)(C). Of course, when it is understood that the exception was included so as to exempt private employer activities required by law, the existence of the exception does not support the inference that federal agencies would otherwise be covered by the Antidiscrimination Provision.[9] The exception plainly does not

[9] The Special Counsel argues that, even if IRCA itself does not waive sovereign immunity, a private claimant nonetheless may obtain judicial enforcement of the Antidiscrimination Provision by invoking the waivers contained in the Administrative Procedure Act, the Federal Tort Claims Act, and the Tucker Act. *See* Special Counsel Memorandum at 10 n.7. The assertion that other avenues may be available for judicial enforcement of the substantive provisions of the Antidiscrimination Provision is not responsive to the conclusion that we reach above. Our point is not that the courts may never enforce a substantive rule of conduct against the federal government; rather, it is that the substantive rules of the Antidiscrimination Provision, read in light of longstanding principles of statutory construction, do not encompass governmental conduct.

Moreover, we are unaware of any evidence that Congress wished to include federal agencies within the Antidiscrimination Provision but to relegate claims against these agencies—unlike claims against private entities—to an enforcement scheme different from that set forth in the provision. The more plausible inference is that Congress did not intend the Antidiscrimination Provision to cover federal agencies in the first

constitute an "unequivocal" expression of congressional intent to waive the sovereign immunity of the United States.

To the extent that there is any evidence in the legislative history on the specific question presented here, it too suggests that Congress did not contemplate that federal agencies would be included under the Antidiscrimination Provision. First, there is no express discussion of the application of IRCA to federal agencies, which one would certainly expect to find if Congress intended to cover these agencies. Second, although the committee reports on the bills that became IRCA and on similar proposals from earlier Congresses include detailed estimates of the enforcement costs of the legislation to the federal government, they make no mention of compliance costs. *See* S. Rep. No. 485, 97th Cong., 2d Sess. 52-56 (1982); S. Rep. No. 62, 98th Cong., 1st Sess. 57-64 (1983); H.R. Rep. No. 115, 98th Cong., 1st Sess., pt. 1, at 99-107 (1983); S. Rep. No. 132, 99th Cong., 1st Sess. 57-66 (1985); H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 128-29 (1986). Had Congress understood that the federal government would come within IRCA, these reports almost certainly would have included cost estimates for federal agency compliance.[10]

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place. In fact, the provisions relied on by the Special Counsel would provide relief against federal agencies less complete than, or inconsistent with, the provisions in IRCA. The Administrative Procedure Act waives sovereign immunity for suits brought by persons "aggrieved by agency action" but permits only those suits that "seek[] relief *other than money damages*." 5 U.S.C. § 702 (emphasis added). The waivers in the Federal Tort Claims Act (28 U.S.C. § 1346(b)) and the Tucker Act (28 U.S.C. §§ 1346(a)(2), 1491) would permit damage actions but would provide for a sequence of judicial review—involving either the district court or the Claims Court—that is inconsistent with that provided in the Anti-discrimination Provision.

[10] The Supreme Court has recently stated that "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be

The Special Counsel relies primarily on a passage from the Senate Report on IRCA in support of his position that federal agencies are included within the act. The passage states that the phrase "person or other entity," as used in the Employer Sanction Provision, covers "individuals, partnerships, corporations and other organizations, nonprofit and profit, private and *public*, who employ, recruit, or refer persons for employment in the United States." S. Rep. No. 132, at 32 (emphasis added). Even if we were to discount the Supreme Court's statement in *Nordic Village* and accept the assertion that Congress could waive sovereign immunity through legislative history, we could not conclude that the mention of "public" employers in this passage compels the inclusion of federal agencies within the coverage of IRCA. States and municipalities may act as employers and many states operate employment agencies. All of these entities would be "public" employers and thus could well be the organizations referenced in the Senate Report.[11]

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supplied by a committee report." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (citations omitted). Our analysis of the legislative history is thus purely confirmatory.

[11] The Special Counsel also cites the House Report on IRCA, which states that the Employer Sanction Provision applies to "all employers regardless of the number of employees, as well as to those persons who recruit or for a fee refer undocumented aliens for employment." H.R. Rep. No. 682, at 56. This statement adds nothing to the statement in the Senate Report; in fact, unlike the Senate Report, the House Report does not even state that "public" entities are included within the Employer Sanction Provision.

Apart from legislative history, the Special Counsel observes that regulations promulgated by the Immigration and Naturalization Service for enforcement of the Employer Sanction Provision define the term "entity" to include "governmental bod[ies]." 8 C.F.R. § 274a.1(b). The regulation does not refer explicitly to the *federal* government, however, and in any event, administrative regulations "can neither enlarge nor diminish the scope of the waiver of immunity" set forth by Congress in

IV.

Our conclusion that the phrase "person or other entity" as used in the Antidiscrimination Provision does not include federal agencies is reinforced by the fact that a contrary construction would raise serious separation of powers issues. Were we to conclude that federal agencies are subject to the Antidiscrimination Provision, an officer within the Department of Justice, 8 U.S.C. § 1324b(c)(1), would have authority to sue other federal agencies in federal court. *Id.* § 1324b(j)(1) (authorizing Special Counsel to seek enforcement by the district court of ALJ orders). Such intra-executive branch litigation likely would contravene Articles II and III of the Constitution.

By its terms, Article II vests the entire executive power in the President. U.S. Const. art. II, § 1, cl. 1. As a necessary concomitant to this exclusive grant of power, the President has the authority to resolve intra-executive branch disputes in order to secure "that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers v. United States*, 272 U.S. 52, 135 (1926). Suits by one executive branch agency against another, however, would, in likely contravention of Article II, transfer the power to resolve such disputes from the President to the federal courts. *See generally Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 135-38 (1989).

Intra-executive branch lawsuits would also raise serious questions under Article III of the Constitution. Article III courts may resolve only those disputes in which there is a genuine "Case[]" or "Controvers[y]" involving a concrete

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the underlying statute. *Millard v. United States*, 16 Cl. Ct. 485, 490 (1989), *aff'd*, 916 F.2d 1 (Fed. Cir. 1990), *cert. denied*, 500 U.S. 916 (1991).

adversity of interests between the parties. U.S. Const. art. III, § 2. Given that there is ultimately but a single interest of the executive branch—that determined by the President—litigation between two executive agencies would not appear to involve the requisite adversity of interests to constitute a "Case[]" or "Controvers[y]" within the meaning of Article III. *See, e.g., Defense Supplies Corp. v. United States Lines Co.*, 148 F.2d 311, 312-13 (2d Cir.), *cert. denied*, 326 U.S. 746 (1945) (dismissing suit against United States by a corporation whose stock was wholly owned by the United States on ground that "this [is] . . . nothing more than an action by the United States against the United States . . . . [T]here is no real case or controversy."); *United States ex. rel. TVA v. Easement and Right of Way*, 204 F. Supp. 837, 839 (E.D. Tenn. 1962) ("[I]nter-agency disputes . . . are not subject to settlement by adjudication . . . . The settlement of interagency problems within the United States Government is not a judicial function but rather an administrative function."); 13 Op. O.L.C. at 138-141; *Proposed Tax Assessment Against the United States Postal Service*, 1 Op. O.L.C. 79, 81-82 (1977).[12]

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[12] The courts sometimes decide cases nominally between two executive branch bodies, where one of the parties in interest is a private entity not within the President's control. *See, e.g., United States v. ICC*, 337 U.S. 426 (1949) (United States in its proprietary status as a shipper sought from railroads monetary relief that had been denied by the Interstate Commerce Commission); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954) (Secretary of Agriculture intervened in action by private agricultural interests before the ICC to recover for railroad overcharges); *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967) (Secretary of Interior intervened on behalf of private power company and municipality seeking Federal Power Commission approval of dam); *United States v. Federal Maritime Comm'n*, 694 F.2d 793 (D.C. Cir. 1982) (Department of Justice challenged ocean carriers' agreement that earlier had been approved by Federal Maritime Commission).

In an enforcement action brought by the Special Counsel against a federal agency, however, the United States would be the real party in

Interpreting the phrase "other entit[ies]" to include federal agencies would also raise the troublesome specter of litigation by the executive branch against coequal branches of the federal government, for there would be no principled basis on which to exclude the Congress and the judiciary from the reach of the Antidiscrimination Provision. Given the extraordinary nature of litigation by the executive branch—here, the Special Counsel—against coequal branches of the government, we hesitate to infer that such was authorized by Congress in the absence of affirmative evidence. This reticence is particularly appropriate given that Congress has taken great care to condition the applicability of other federal employment laws to itself and the judiciary.[13]

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interest on both sides of the litigation. The defendant would be an agency of the United States, and the real party in interest on the prosecution side would also be the United States, acting in its sovereign capacity. Only where the Special Counsel has declined to sue and a claimant brings suit directly against a "person or other entity" alleged to have engaged in discrimination, *see* 8 U.S.C. § 1324b(d)(2), could there exist the requisite concrete adversity of interests, because only in this circumstance would one of the litigants be beyond presidential control.

[13] For example, in enacting the Civil Rights Act of 1991, Congress substantially limited the procedural protections and enforcement provisions available to plaintiff-employees seeking various types of relief against Congress. *See* §§ 117, 301-314 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1080, 1088-95 (1991) (providing for procedures and remedies available to House and Senate employees under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16), and also providing for procedures and remedies for Senate employees under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 633a), and the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12112-12114)).

Prior to enactment of the Civil Rights Act of 1991, Title VII barred executive branch agencies from discriminating on the basis of "race, color, religion, sex, or national origin," but that prohibition applied only to those few "units of the legislative and judicial branches . . . having

The problems with interpreting the phrase "person or other entity" in IRCA to include federal agencies would not be confined to the Antidiscrimination Provision alone. For example, many of the difficulties identified above would also exist with respect to the parallel Employer Sanction Provision of IRCA, which prohibits the hiring by any "person or other entity" of "unauthorized alien[s]." 8 U.S.C. § 1324a(a)(1).[14] Were we to conclude that federal agencies are "person[s] or other entit[ies]," the Employer Sanction provision would contemplate the imposition of mandatory civil penalties on the government, *id.* § 1324a(e)(4), requiring a waiver of sovereign immunity. It would permit the imposition of criminal penalties on a federal agency, *id.* § 1324a(f)(1), without any specific evidence that such an extraordinary measure was intended. Moreover, because the exclusive enforcement mechanism for such penalties would be a suit by the Attorney General against another federal agency, *id.* § 1324a(e)(9), the Attorney General could bring an enforcement action against another executive agency and indeed against the Congress or the judiciary.[15]

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positions in the competitive service." 42 U.S.C. § 2000e-16(a). The Fair Labor Standards Act was, and still is, similarly limited. 29 U.S.C. § 203(e)(2)(A)(iii).

[14] Congress enacted the Antidiscrimination Provision in response to the concern that employers might discriminate as a result of the Employer Sanction Provision against persons legitimately in this country. *See* H.R. Rep. No. 682, at 68. Thus, "[t]he antidiscrimination provisions of th[e] [statute] are a complement to the sanctions provisions, and must be considered in this context." H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 87 (1986). The same "person[s] or other entit[ies]" are subject to both the Antidiscrimination Provision and the Employer Sanction Provision.

[15] Application of the Employer Sanction Provision of IRCA to federal agencies would bar those agencies from hiring only two narrow classes of aliens not already barred by Exec. Order No. 11935, *see supra* note 9, and similar restrictions found in annual appropriations since 1943. *See, e.g.*,

The Supreme Court has admonished that constructions of a statute that would render it constitutionally suspect should be avoided where a reasonable alternative reading of the statute is available. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). Here, such a reading—under which the phrase "person or other entity" would not include the federal government—not only is reasonable but is consistent with established principles of statutory construction and sovereign immunity.

CONCLUSION

We conclude on careful reconsideration of the statutory text of IRCA, its structure, purpose, and legislative history that federal agencies are not included within the phrase "person or other entity" in 8 U.S.C. § 1324b(a)(1). Accordingly, the Special Counsel is without authority to investigate or to bring charges of immigration-related employment discrimination against federal agencies. Discrimination

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Treasury, Postal Service and General Government Appropriations Act, 1992, Pub. L. No. 102-141, § 607, 105 Stat. 834, 868-69 (1991) ("Appropriations Act for 1992") (current appropriation); 5 U.S.C. § 3101 note (listing prior appropriations). Specifically, such an application of IRCA would prohibit federal agencies from hiring for a position outside of the competitive service (*i.e.*, a position not covered by Exec. Order No. 11935), those few unauthorized aliens to whom compensation otherwise may be paid under an exception to appropriations legislation. Such individuals would have to be "person[s] in the service of the United States . . . who, being eligible for citizenship, ha[ve] filed . . . declaration[s] of intention to become . . . citizen[s] of the United States . . . and [are] actually residing in the United States," or "person[s] who owe[] allegiance to the United States," or foreign nationals of certain specified countries. Appropriations Act for 1992, § 607, 105 Stat. at 868-69. There is no evidence that Congress wished to subject federal agencies to the Employer Sanction Provision of IRCA to obtain this incremental additional coverage.

by federal agencies based upon national origin is fully redressable under Title VII of the Civil Rights Act of 1964, which by its terms applies to federal executive agencies.[16]

Our contrary opinion of May 2, 1990, is withdrawn.

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[16] Title VII does not provide a remedy for employment discrimination based upon citizenship status. However, since 1943, annual appropriations acts passed by Congress have, with narrow exceptions, prohibited the use of appropriated funds to pay salaries to federal employees who are not "citizen[s] of the United States." *See, e.g.*, Appropriations Act for 1992, § 607, 105 Stat. at 868-69 (current appropriation); 5 U.S.C. § 3101 note (listing prior appropriations); *see also supra* note 15. As the Special Counsel observes, "the vast majority of federal civil service positions are open only to United States citizens." Special Counsel Memorandum at 4. Thus, there are only a limited number of circumstances in which there is even the potential for a cognizable claim of citizenship status discrimination.

Of course, our opinion does not preclude federal agencies, as a matter of policy, from continuing to adhere to the immigration status verification procedures prescribed by the Office of Personnel Management. *See* Federal Personnel Manual Supplement 296-33, Subch. 5-2.6a (1988) (requiring use of Standard Form I-9).

APPENDIX D

The following is an excerpt from pages 18-20 of the brief for the United States in *Hensel v. Office of Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994):

ARGUMENT

I. THE IRCA DOES NOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES

In the administrative proceedings below, the VA Hospital argued that the ALJ did not have jurisdiction over it because the IRCA does not waive the federal government's sovereign immunity. *See* AR 2740-42, 4257-58. The ALJ found it unnecessary to address this issue given the holding that petitioner had failed to meet her burden in defending the motion for summary decision. AR 19.

Because the sovereign immunity issue determines this Court's jurisdiction with respect to the federal government, the court must decide it even though the ALJ declined to do so. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). Moreover, this Court can affirm on any ground supported by the record even if that ground did not form the basis of the ALJ's decision. *Aspinall v. United States*, 984 F.2d 355, 357 (10th Cir. 1993). This Court reviews the sovereign immunity issue *de novo*. *Sierra Club v. Lujan*, 972 F.2d 312, 314 (10th Cir. 1992).

"It has long been established that * * * the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see* also *Sierra Club*, 972 F.2d at 314. Sovereign immunity extends to federal agencies and officers acting in their official capacities. *See Western Shoshone Business Council v. Babbit*, 1 F.3d 1052, 1058 (10th Cir. 1993); *see, e.g., Irwin v. Veterans Admin.*, 498 U.S. 89, 93-94 (1990).

Sovereign immunity bars an action if, among other things, "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Application of the IRCA to the VA Hospital in this case plainly would implicate sovereign immunity. Dr. Hensel seeks an order requiring the VA Hospital to hire her (AR 14), which would compel the government to act. She also seeks back pay (*id.*), which would expend itself on the United States Treasury. Therefore, sovereign immunity bars this action unless it has been waived.

As we show below, nothing in the text of the IRCA contains the unequivocal expression necessary to waive the federal government's sovereign immunity. The VA Medical Center, as a field office of the Veterans Administration, cannot be hailed into court under the jurisdictional provisions of the IRCA.[2]

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[2] We note that Respondent Oklahoma Health Services Center contends that it is protected by Eleventh Amendment immunity, and that the IRCA does not waive that immunity. This case involves a claim brought against Oklahoma by a private individual, and does not raise the issue of whether the United States could bring an action against a state for alleged violation of the IRCA. Accordingly, in resolving the state's argument for immunity in this case, the Court need not decide whether a claim brought by the Office of Special Counsel (a component of the Department of Justice) also would be barred by the Eleventh Amendment. With respect to any such claim, we note that the Supreme Court has stated that the Eleventh Amendment would not bar such an action. *See West Virginia v. United States*, 479 U.S. 305, 311-12 & n.4 (1987). In any event, the University's Eleventh Amendment argument does not affect our reliance upon and analysis of the sovereign immunity of the United States, which is broader than a state's Eleventh Amendment immunity. *See e.g., Missouri v. Jenkins*, 491 U.S. 274, 280-81 & n.3 (1989); *Reopell v. Commonwealth of Massachusetts*, 936 F.2d 12, 15 (1st Cir.), *cert. denied*, 112 S. Ct. 637 (1991)